

**BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SUBREGION 17**

**EYM KING OF MISSOURI, LLC,** )  
**D/B/A/ BURGER KING,** )  
 )  
**Respondent,** )  
 )  
**AND** )  
 )  
**WORKERS' ORGANIZING** )  
**COMMITTEE-KANSAS CITY,** )  
 )  
**Charging Party.** )

**Case No.: 14-CA-148915  
14-CA-150321  
14-CA-150794**

**CHARGING PARTY'S REPLY BRIEF  
ANSWERING RESPONDENT'S EXCEPTIONS**

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**ATTORNEYS FOR CHARGING PARTY**

## TABLE OF CONTENTS

I.	INTRODUCTION.....	10
II.	MATERIAL FACTS PRESENTED.....	11
	A. THE PARTIES.....	11
	B. RESPONDENT’S TAKEOVER OF BURGER KING LOCATION AND FAILURE TO HIRE WISE.....	12
	C. EMPLOYEES’ PROTECTED CONCERTED ACTIVITIES.....	16
	D. RESPONDENT’S DISCIPLINE AGAINST WORKERS FOR PROTECTED CONCERTED ACTIVITY.....	17
III.	ARGUMENT.....	17
	A. RESPONDENT’S EXCEPTIONS FAIL TO MEET REQUIREMENTS OF SECTIONS 102.46(b)(2) AND 102.46(c)(3) AND SHOULD, THEREFORE, BE DISREGARDED.....	17
	B. PARTICIPATION IN THE APRIL 15, 2015 STRIKE WAS PROTECTED ACTIVITY UNDER THE ACT BECAUSE, AS A MATTER OF LAW, THE STRIKE WAS NOT PART OF A PLAN OR PATTERN OF INTERMITTENT ACTION INCONSISTENT WITH A GENUINE STRIKE. ACCORDINGLY, EYM DISCRIMINATED AGAINST THE CHARGING PARTY AS A RESULT OF ITS ENGAGING IN PROTECTED CONCERTED ACTIVITIES.....	19
	i. EMPLOYER FAILED TO PROVE, AS A MATTER OF LAW, THAT THE APRIL 15TH STRIKE WAS INTERMITTENT STRIKE.....	22
	ii. AS A MATTER OF LAW, THE VERY FACTUAL FINDINGS OF THE ALJ DID NOT ESTABLISH THAT THE APRIL 15TH STRIKE WAS AN UNPROTECTED INTERMITTENT WORK STOPPAGE BY WHICH THE EMPLOYEES AND THE UNION ATTEMPTED TO ARROGATE TO THEMSELVES THE RIGHT TO DICTATE EMPLOYEE SCHEDULES AND HOURS.....	24
	a. FREQUENCY AND TIMING OF STRIKES.....	29
	b. WHETHER THE STRIKE’S INTENT WAS TO HARASS.....	31
	c. UNION INVOLVEMENT AND WHETHER STRIKE WAS PART OF A COMMON PLAN.....	33

<i>d. WHETHER STRIKE TAKEN TO ADDRESS DISTINCT ACTS OF THE RESPONDENT.....</i>	34
<i>e. WHETHER EMPLOYEES INTENDED TO REAP THE BENEFITS OF A STRIKE WITHOUT RISK.....</i>	36
C. THE ALJ PROPERLY CONCLUDED, AS A MATTER OF LAW, THAT THE GENERAL COUNSEL MADE OUT A PRIMA FACIE CASE OF DISCRIMINATION AND RETALIATION AGAINST CAMILLO, HUMBERT, AND ORTIZ BECAUSE THERE WAS DIRECT EVIDENCE THAT HAYES HAD KNOWLEDGE THESE THREE EMPLOYEES ENGAGED IN PROTETED ACTIVITY.....	37
D. AS A MATTER OF LAW, THE ALJ CORRECTLY FOUND THAT THE GENERAL COUNSEL ESTABLISHED THAT LAREDA HAYES’S DECISION NOT TO HIRE WISE WAS UNLAWFUL.....	45
<i>i. DISCRIMINATION UNDER SECTIONS 8(a)(1) and 8(a)(3).....</i>	45
<i>a. RESPONDENT WAS HIRING AT THE TIME OF DISCRIMINATION.....</i>	48
<i>b. WISE HAD EXPERIENCE AND TRAINING FOR THE POSITION, ALTERNATIVELY HAYES’S HIRING CRITERIA WERE USED AS PRETEXT FOR DISCRIMINATION AGAINST WISE.....</i>	48
<i>c. HAYES KNEW OF WISE’S UNION SUPPORT AND HAYES’S ANTI-UNION ANIMUS CONTRIBUTED TO THE DECISION NOT TO HIRE WISE.....</i>	53
IV. CONCLUSION.....	59

## TABLE OF AUTHORITIES

### Cases

<i>Adair Standish Corp. v. NLRB</i> , 912 F.2d 854 (6th Cir. 1990).....	56
<i>Aneco, Inc.</i> , 325 NLRB 400 (1998).....	47, fn. 9
<i>Anderson Cabinets</i> , 241 NLRB 513 (1979).....	41
<i>Associated Milk Producers, Inc.</i> , 259 NLRB 1033 (1982), <i>enforced</i> , 711 F.2d 627 (5th Cir. 1983).....	57
<i>Audubon Health Care Center</i> , 268 N.L.R.B. 135 (1983).....	23, 36
<i>Avondale Indus.</i> , 329 NLRB 1064 (1999).....	57, 58
<i>Boston Mut. Life Ins. Co. v. NLRB</i> , 629 F.2d 169 (1st Cir. 1982).....	57
<i>Burnup S. Sims, Inc.</i> , 256 NLRB 965 (1981).....	41
<i>Blaylock Electric</i> , 319 NLRB 928 (1995).....	47, fn. 9
<i>Blades Manufacturing Co.</i> , 344 F.2d 998 (8th Cir. 1965).....	34-35
<i>Big E's Foodland, Inc.</i> , 242 NLRB 963 (1979).....	47, fn. 9
<i>Care Ctr. of Kan. City</i> , 350 N.L.R.B. 64 (N.L.R.B. 2007).....	23, 33, 37
<i>Carson Trailer, Inc.</i> , 352 NLRB 1274 (2008).....	18
<i>CGLM, Inc.</i> , 350 NLRB 974 (2007), <i>enfd</i> 280 Fed. Appx 366 (5 <sup>th</sup> Cir. 2008).....	41

<i>Chelsea Homes, Inc.</i> , 298 NLRB 813 (1990).....	5, 27
<i>CL Frank Management</i> , 358 NLRB No. 111 (2012).....	41
<i>Cobb Mechanical Contractors, Inc. v. NLRB</i> , 295 F.3d 1370 (D.C. Cir. 2002).....	47
<i>C.P. Associates, Inc.</i> , 336 NLRB 167 (2001).....	40
<i>Crenlo, Div. of GF Business Equipment, Inc.</i> , 215 NLRB 872 (1974).....	28
<i>Davey Roofing, Inc.</i> , 341 NLRB 222 (2004).....	42
<i>E.C. Waste, Inc. v. NLRB</i> , 359 F.3d 36 (1st Cir. 2004).....	38, 39
<i>Embossing Printers, Inc.</i> , 268 NLRB 710 (1984) <i>enf'd</i> 742 F.2d 1456 (6th Cir. 1984).....	31, 32
<i>FedEx Freight East, Inc. v. NLRB</i> , 431 F.3d 1019 (7th Cir. 2005).....	57
<i>FES (a Division of Thermo Power)</i> , 331 NLRB No. 20 (2000), <i>enforced</i> 301 F.3d 83 (3d Cir. 2002).....	47
<i>First National Bank of Omaha</i> , 171 N.L.R.B. 1145 (1968), <i>enfd.</i> 413 F.2d 921 (8th Cir. 1969).....	23
<i>Fluor Daniel, Inc.</i> , 311 NLRB 498 (1993).....	39, 47 n. 9, 57
<i>Fluor Daniel, Inc. (Fluor Daniel I)</i> , 304 NLRB 970 (1991).....	39
<i>General Thermo, Inc.</i> , 250 NLRB 1260 (1980) <i>enf. denied</i> 664 F.2d 195 (8th Cir. 1981).....	43, 51
<i>Gold Coast Restaurant Corp. v. NLRB</i> , 995 F.2d 257 (D.C. Cir. 1993).....	46
<i>Honolulu Rapid Transit Co.</i> ,	

110 NLRB 1806 (1954).....	22, 23, 30, 33
<i>Hugh H. Wilson Corp. v. NLRB</i> , 414 F.2d 1345 (3d Cir. 1969).....	55
<i>Iowa Packing Co.</i> , 338 NLRB 1140 (2003).....	41
<i>International Carolina Glass</i> , 319 NLRB 171 (1995).....	49
<i>John S. Swift Co.</i> , 124 NLRB 394 (1959), enfd. 277 F.2d 641 (7th Cir. 1960).....	23, 36
<i>Johnnie Johnson Tire Co.</i> , 271 NLRB 293 (1984).....	27, 29
<i>Justak Bros. &amp; Co. v. NLRB</i> , 664 F.2d 1074 (7th Cir. 1981).....	55
<i>Lafayette Park Hotel</i> , 326 NLRB 824 (1998).....	44
<i>LandMark Elec.</i> , Case No. 31-CA-21751, 1996 N.L.R.B. GCM LEXIS 12 (May 17, 1996).....	31, 32
<i>Lisanti Foods Inc.</i> , 227 NLRB 898 (1977).....	41
<i>Lutheran Heritage Village-Livonia</i> , 343 NLRB 646, 647 (2004).....	44
<i>McGaw of Puerto Rico, Inc. v. NLRB</i> , 135 F.3d 1 (1st Cir. 1997).....	49
<i>Metropolitan Edison Co. v. NLRB</i> , 460 U.S. 693 (1983).....	38-39 n. 7, 46 n. 8
<i>Miramar Hotel Corp.</i> , 336 NLRB 1203 (2001).....	44, 51
<i>National Steel and Shipbuilding Co.</i> , 324 NLRB 499 (1997), enfd., 156 F.3d 1268 (D.C.Cir. 1998).....	22, 32
<i>New Concept Solutions, LLC</i> , 349 NLRB 1136 (2007).....	18

<i>NLRB v. A &amp; T Mfg. Co.,</i> 738 F.2d 148 (6 <sup>th</sup> Cir. 1984).....	51
<i>NLRB v. American Bed Spring Mfg. Co.,</i> 670 F.2d 1236 (1st Cir. 1982).....	56
<i>NLRB v. Gold Standard Enterprises, Inc.,</i> 679 F.2d 673 (7th Cir. 1982).....	55
<i>NLRB v. Horizon Air Services,</i> 761 F.2d 22 (1st Cir.1985).....	39, 55
<i>NLR B v. Montgomery Ward &amp; Co.,</i> 157 F. 2d 486 (8th Cir. 1946).....	36
<i>NLRB v. Overseas Motor, Inc.,</i> 721 F.2d 570 (6th Cir. 1983).....	51
<i>NLRB v. Town &amp; Country Elec., Inc.,</i> 516 U.S. 85 (1995).....	46
<i>NLRB v. Transportation Management Corp.,</i> 462 U.S. 393 (1983).....	38, 39, 46
<i>NLRB v. Washington Aluminum Co.,</i> 370 U.S. 9 (1962).....	40
<i>Norfolk Shipbuilding,</i> 1990 NLRB GCM LEXIS 81 (Nov. 7, 1990).....	33
<i>Pacific Telephone and Telegraph Company,</i> 107 NLRB 1547 (1954).....	26, 27, 29, 30, 31, 32, 33
<i>Polytech, Inc.,</i> 195 N.L.R.B. 695 (1972).....	19, 20, 22, 23, 27, 29, 30, 42
<i>Power Equipment Company,</i> 330 NLRB 70 (1999).....	40
<i>Robert Orr/Sysco Food Services,</i> 343 NLRB 1183 (2004).....	46
<i>Robertson Industries,</i> 216 NLRB 361 (1975).....	27
<i>Ronin Shipbulding,</i>	

330 NLRB 464 (2000).....	46
<i>Sunshine Piping, Inc.</i> , 351 NLRB 1371 (2007).....	18
<i>Shattuck Denn Mining Co. v. NLRB</i> , 362 F.2d 466 (9th Cir. 1966).....	40, 53, 55
<i>The Bond Press, Inc.</i> , 254 NLRB 1227 (1981).....	56
<i>TIC–The Industrial Co. Southeast</i> , 322 NLRB 605 (1996).....	57
<i>Traction Wholesale</i> , 216 F.3d 92 (D.C. Cir. 2000).....	47
<i>United States Service Industries</i> , 315 N.L.R.B. 285 (1994).....	31, 32
<i>University of Southern California</i> , Case No. 31-CA-23538, 1999 NLRB GCM Lexis 35 (April 27, 1999).....	30
<i>Valley City Furniture</i> , 110 NLRB 1589 (1954).....	36
<i>Walker Stainless, Inc.</i> , 334 NLRB 1260 (2001).....	58
<i>WestPac Elec., Inc.</i> , 321 NLRB 1322 (1996).....	23, 34, 35, 36
<i>W.F. Bolin Co.</i> , 70 F.3d 863 (6th Cir. 1995).....	51
<i>Willmar Electric Service, Inc. v. NLRB</i> , 968 F.2d 1327 (D.C. Cir. 1992).....	46
<i>Wright Line, a Division of Wright Line, Inc.</i> , 251 NLRB 1083 (1980), enfd 662 F.2d 899 (1 <sup>st</sup> Cir 1981), cert den 455 U.S. 989 (1982).....	39, 46, 57, 58
<b>Statutes</b>	
29 U.S.C. § 102.46(b)(2).....	17, 18, 19
29 U.S.C. § 102.46(c)(3).....	19
29 U.S.C. § 114.....	20

29 U.S.C. § 157.....	<i>passim</i>
29 U.S.C. § 158(a)(1).....	<i>passim</i>
29 U.S.C. § 158(a)(3) .....	<i>passim</i>
29 U.S.C. § 158(a)(4) .....	<i>passim</i>
29 U.S.C. § 163.....	16, 45, 51, 55

## **I. INTRODUCTION**

On February 17, 2016, Administrative Law Judge Christine E. Dibble found that EYM King of Missouri, d/b/a Burger King violated Sections 8(a)(1), 8(a)(3) of the National Labor Relations Act by refusing to rehire Terrence Wise on March 26<sup>th</sup>, 2015 because he engaged in protected concerted activities. Respondent violated Section 8(a)(1) of the Act by issuing written discipline to employees Susana De la Cruz Camilo, Kashanna Coney, MyReisha Frazier, West Humbert, Osmara Ortiz, and Myresha Vaughn on April 16th, 2015 because they engaged in protected concerted activities. The ALJ also concluded that the above violations were unfair labor practices that affect commerce within the meaning of Section 2(6) and (7) of the Act.

This case was heard by Judge Dibble on August 11, 2015, based on consolidated complaints alleging that Respondent EYM King of Missouri, d/b/a Burger King, violated Sections 8(a)(1), and 8(a)(3) of the National Labor Relations Act by refusing to hire Terrance Wise, one of the nation's most well-known members of the Workers' Organizing Committee and Fight for \$15 and a Union, because of his participation in protected concerted activities, and for having filed charges of discrimination with the NLRB. Respondent violated Sections 8(a)(1) and 8(a)(3) through verbal and written discipline of Susana De La Cruz Camilo, Kahanna Coney, Myreisha Frazier, West Humbert, Osmara Ortiz, and Myesha Vaughn for engaging in protected concerted activities. Considering evidence of Respondent's animus toward these employees' protected activity and its failure to meet its burden of establishing a non-discriminatory basis for its actions, the record overwhelmingly demonstrates that Respondent violated the Act as alleged.

The ALJ made several credibility findings to which Respondent takes exception. Respondent's main line of attack against the ALJ's credibility findings and legal conclusions

centers around the ALJ's determination that the aforementioned workers did not get engage in an unprotected intermittent strike and that their concerted activities were protected under the Act.

These workers engaged in a one day strike on April 15, 2015. This was the first and only strike against Respondent EYM in which these workers had engaged. As the only one-day strike against Respondent, this strike cannot be considered "intermittent." Moreover, regardless of the one-day nature of this strike, these workers' conduct does not meet the definition of "intermittent strike" under any of the relevant facts this Board considers under such an analysis.

## **II. MATERIAL FACTS PRESENTED**

### **A. THE PARTIES**

The ALJ concluded that Respondent is a limited liability company, engaged in the retail operation of Burger King franchise restaurants selling food and beverages to the general public. ALJD P2, L 18-31. The ALJ found that Respondent was, at all materials times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. *Id.* On March 26, 2015, Respondent assumed ownership of several Burger King restaurants from Strategic Restaurants (Strategic). ALJD P3, L5-6. Included in Respondent's purchase of Burger King restaurants were restaurants located at 1102 E. 47<sup>th</sup> Street, Kansas City, Missouri and 3441 Main Street, Kansas City, Missouri. ALJD P3, L6-9.

The Workers' Organizing Committee of Kansas City exists "for the purpose in full or in part of dealing with employers concerning wages, rates of pay or conditions of work." Tr. 269 (McCormack-Enriquez). The Workers Organizing Committee—Kansas City (hereinafter "WOC-KC") is "a city-wide organization of fast food workers and other low wage workers who have been organizing...in Kansas City for \$15 an hour and the right to form a Union without retaliation," and is also called the Fight for \$15. Tr. 30 (Wise). These fast food and low wage

workers organize rallies and strikes to assist workers to receive better pay and better treatment in fast food and low wage jobs. Tr. 31 (Wise).

The workers of WOC-KC also engaged in other activities to assert their rights on the job to their employers. For example, in March 2015, WOC-KC workers campaigned against health and safety violations in their restaurants in Kansas City, Missouri, demanding first aid kits, protective equipment while they were doing hazardous tasks at work, and repairs to broken equipment such as grease traps and water hoses. Tr. 45-46 (Wise); Tr. 199-201, 210 (Ortiz). Worker-members of WOC-KC, such as Terrance Wise, Suzana De La Cruz Camillo, West Humbert, and Osmara Ortiz, signed, read aloud, and submitted a petition to their store manager, Respondent's employee LaReda Hayes, demanding such protections and repairs. Tr. 46-47 (Wise); Tr. 199-201, 210 (Ortiz). In addition to strikes and health and safety campaigns, WOC-KC hosts rallies for workers and allies in the Fight for \$15 and a Union within the local Kansas City community. Tr. 87: 1-2 (Wise); Tr. 1889 (Humbert); Tr. 214-215 (Ortiz).

Finally, WOC-KC workers have filed several unfair labor practice charges with the National Labor Relations Board, Subregion 17, against various employers in Kansas City, Missouri, including Respondent and Respondent's predecessor-in-interest, Strategic Restaurants, many of which involved Respondent's store manager LaReda Hayes at the 47<sup>th</sup> and Troost Avenue Burger King in Kansas City, Missouri. Tr. 47-60 (Wise); GC's Ex. 9, 10, 12, 13, 14, 18.

## **B. RESPONDENT'S TAKEOVER OF BURGER KING LOCATION AND FAILURE TO HIRE WISE**

Terrance Wise was employed at the Burger King located at 1102 East 47<sup>th</sup> Street, Kansas City, Missouri for approximately six years. Tr. 29-30 (Wise). He served there as a general crew member. *Id.* Wise is a member of WOC –KC and has been since the Spring of 2013. Tr. 32, 176. His peers have called him “a leader in the movement,” one of the movement’s spokespersons (Tr. 177: 15-17 (Humbert)) and main speakers (Tr. 223 (Jones)), and a “public figure because he was the first one to stand up outside that Burger King” (Tr. 202: 13-17 (Ortiz)); Tr. 271 (McCormack-Enriquez). His involvement with WOC-KC and the Fight for \$15 and a Union was described as “well known” and Wise has been called a “leader” in Respondent’s store. Tr. 202: 23-24 (Ortiz); Tr. 271 (McCormack-Enriquez).

In addition to being a member of WOC-KC (Tr. 32), Wise is a national leader in the Fight for \$15 and a Union movement, engaging in rallies and protests across the country and the globe. Tr. 32; Tr. 270-72 (McCormack-Enriquez). Wise has participated in rallies and activities supporting the Fight for \$15 and a Union in New York, Las Vegas, Chicago, and Ireland, where he even met with Ireland’s President, members of Ireland’s Labour Party, and Sinn Fein. *Id.*; Tr. 270-72 (McCormack-Enriquez). Before 2015, Wise had spoken at news conferences, press conferences, rallies, protests, and strikes. Tr. 33-34. He had been featured in numerous publications, TV shows, and interviews, including the New York Times, which also did an exclusive on Wise, the Washington Post, the Houston Chronicle, Huffington Post, ABC News, Fox News, the Kansas City Star, The Guardian, the Guardian UK, the Wall Street Journal, USA Today, radio stations, and several other local TV stations. Tr. 34; GC’s Ex. 2, 3, 4, 6; Tr. 270-72 (McCormack-Enriquez).

On March 26, 2015, Respondent EYM King of Missouri, d/b/a Burger King, took over operations of the Burger King restaurant located at 1102 East 47<sup>th</sup> Street, Kansas City, Missouri,

where Wise was employed, after purchasing that location from Strategic Restaurants. Tr. 61-66. On March 26, 2015, Respondent did not rehire Wise, although it rehired almost every other former employee of Strategic Restaurants, including those that had far less experience and worse performance records. Tr. 61-66; *see* Tr. 162, 190. Although Wise worked at Strategic Restaurants only until Respondent took over operations, Wise's store manager, LaReda Hayes, transitioned to become the store manager of the same location under Respondent's ownership. Tr. 41-42, 61 (Wise); Tr. 327-328 (Hayes). On March 25, 2015, Hayes gave Wise an application—composed of a single form—purportedly to be considered for rehire under Respondent's ownership. In stark contrast, Hayes gave other employees a more elaborate folder that contained an application, I-9 forms, and W-2 forms. Tr. 62-63; Tr. 152: 11-12 (Humbert); GC Ex. 39; Tr. 190-91 (Ortiz); GC Ex. 40; Tr. 222: 10-19 (Jones); Tr. 328: 22-25 (Hayes). Despite overwhelming evidence to the contrary, Hayes claims that she gave Wise the same application she provided to other potential employees. Tr. 345: 14-21 (Hayes). Wise was the only one of Strategic's former employee who applied that was not hired by Respondent. Tr. 193: 2-4 (Ortiz). Most, if not all, of the workers from Strategic that Respondent did not hire did not submit an application to Respondent for employment or had already been terminated from Strategic before Respondent bought Hayes's location. Tr. 376-377 (Hayes). After completing and submitting his application for rehire to Hayes (Tr. 64-65; GC's Ex. 42), Wise was not rehired by Hayes who told him she had to let him go. Tr. 67-68.

Despite Hayes's refusal to rehire Wise under Respondent's ownership (Tr. 67-68), Wise had been honored by store manager Hayes for the quality of his work performance. Tr. 60, 68. In December, 2014, Hayes presented Wise with a certificate of excellence in work for the year 2014 and openly praised Wise for his hard work and for being a very good employee in front of

all of Wise's co-workers. Tr. 60 (Wise). Hayes had also called Wise one of her best workers. Tr. 68. Hayes would also use Wise to help resolve problems with other workers, especially those involved in WOC-KC. Tr. 372-373 (Hayes). Yet, at the time of the present litigation, Hayes complains that Wise had become tardy and "insubordinate" by, for example, giving food to the homeless, after that food had been "counted," that would otherwise have been thrown in the dumpster. Tr. 342: 17-23 (Hayes); Tr. 423-424 (Wise). When asked about Wise's alleged insubordination, Hayes could not cite an instance of insubordination or any specific details about such instances. *See* Tr. 334-385. Wise vehemently denied this insubordination and further clarified that his alleged tardiness was due to being only eight minutes late, because the bus schedule was behind such that he could not have known three hours in advance that he was going to be late. Tr. 418-421 (Wise).

Hayes also claims that an allegation of Wise stealing food was "a factor" in her decision not to rehire him, although she "wasn't there" to witness the alleged theft. Tr. 373 (Hayes). Although, as Hayes alleges, theft is a terminable offense at her restaurant and she claims to have reported the alleged incident to Human Resources, Wise was not terminated or disciplined based on the allegation. Tr. 374-375 (Hayes); Tr. 427-428 (Wise). Wise was clear that he received permission from the manager on that shift to take burgers home with him that day, which was standard practice at that Burger King location. Tr. 426-427 (Wise); Tr. 435-438 (Ortiz). Wise's co-workers have called him "an excellent worker," "on time," "dependable," and "good at what he did." Tr. 176.

Respondent's store manager, Hayes, working under both Respondent and its predecessor-in-ownership, Strategic Restaurants, was acutely aware of Wise's leadership and extensive activity in WOC-KC and the Fight for \$15 and a Union. Tr. 41-43, 75. Prior to WOC-KC's first

strike in 2013, Hayes rifled through Wise's personal backpack and belongings without his consent and found flyers announcing a WOC-KC rally for \$15 and a Union, to which Wise invited Hayes. Tr. 43. Hayes often came to Wise to help her remedy problems she had with workers that she knew to be involved with Wise in the Fight for \$15 and a Union. Tr. 44-45. Wise had filed multiple unfair labor practices with the National Labor Relations Board Subregion 17 involving Hayes and her then-employer, Strategic Restaurants, including a charge for being intimidated and disciplined, for going on strike, and for interfering with his protected concerted Union activity. Tr. 47-50, 50-60; GC's Ex. 9-18. In mid-March, 2015, Wise and other members of WOC-KC engaged Hayes in a "Health and Safety Campaign" by submitting to Hayes a signed petition demanding sufficient oven mitts, repairs to broken equipment, and supplying first aid kits with Band-Aids and burn cream. Tr. 46 (Wise); Tr. 199-201 (Ortiz).

### **C. EMPLOYEES' PROTECTED CONCERTED ACTIVITIES**

West Humbert (Tr. 150-151 (Humbert)), Osmara Ortiz (Tr. 189-90 (Ortiz)), and Susan De La Cruz Camilo work for Respondent at its 47<sup>th</sup> and Troost Avenue Burger King location, where Hayes serves as the manager. They work there with Kashanna Coney, Myreisha Frazier, and Myeisha Vaughn, who are also known by Respondent and Hayes to be members of WOC-KC and the Fight for \$15 and a Union. Tr. 266-268 (Thatch); Tr. 354-355 (Hayes); Respondent's Ex. 25; GC's Ex. 41. On April 15, 2015, Coney, De La Cruz Camillo, Frazier, Humbert, Ortiz, and Vaughn, while employees of Respondent, went on strike from Respondent's 47<sup>th</sup> and Troost Avenue Burger King location. Tr. 162 (Humbert); Tr. 193: 5-11, 203 (Ortiz); GC Ex. 21; Tr. 266-268 (Thatch); Tr. 354-355 (Hayes); Respondent's Ex. 25; GC's Ex. 41. Store manager Hayes was aware that these workers were not present at work on April 15, 2015, because Hayes was provided with a "strike notice" on the morning of April 15<sup>th</sup>, signed by these

workers, indicating the reason they were absent from work. Tr. 162-166 (Humbert); Ex. 21, 22, 36, 37, 38, 39; Tr. 193-95 (Ortiz); Tr. 354-355; Respondent's Ex. 25; GC's Ex. 41. Independent testimony confirms, and Hayes admits outright, that she was aware that Kashanna Coney, Myreisha Frazier, and Myeisha Vaughn were on strike on April 15<sup>th</sup>, 2015. Hayes merely claims, in stark contrast to the record of evidence, that she did not receive their notice until 2:30 pm on April 15<sup>th</sup>, 2015. Tr. 266-268 (Thatch); Tr. 354-355 (Hayes); Respondent's Ex. 25; GC's Ex. 41. That Hayes also received a "return to work notice" signed by these workers indicating that they were returning to work after their strike is not contested. Tr. 162-166, 169; Ex 21, 22, 36, 37, 38, 39; Tr. 196-198 (Ortiz). Coney, De La Cruz Camillo, Frazier, Hubert, Ortiz, and Vaughn are all members of WOC-KC and the Fight for \$15 and a Union. Tr. 46-47 (Wise); Tr. 121, 125, 127; Tr. 142; Tr. 163 (Humbert); GC Ex. 2; Tr. 194-196 (Ortiz).

#### **D. RESPONDENT'S DISCIPLINE AGAINST WORKERS FOR PROTECTED CONCERTED ACTIVITY**

After striking on April 15, 2015, Coney, De La Cruz Camillo, Frazier, Hayes, Ortiz, and Vaughn returned to work on April 16<sup>th</sup>, 2015, and Hayes gave them a document to sign stating that they were being given a disciplinary write up. Tr. 174 (Humbert); Tr. 198-99 (Ortiz); Tr. 266-268 (Thatch); Tr. 354-355 (Hayes); Respondent's Ex. 25; GC's Ex. 41. Hayes claimed they were being written up because "they didn't have anybody to cover" their "shifts at the present time." Tr. 174 (Humbert); GC's Ex. 41.

### **III. ARGUMENT**

#### **A. RESPONDENT'S EXCEPTIONS FAIL TO MEET REQUIREMENTS OF SECTIONS 102.46(b)(2) AND 102.46(c)(3) AND SHOULD, THEREFORE, BE DISREGARDED**

Respondent's exceptions largely reiterate arguments already addressed by the General Counsel and Charging Party in their Post-Hearing Briefs and rejected by the ALJ in the underlying proceeding. Significantly, Respondent does not specifically say how or why it excepts to most of the ALJ's factual findings, credibility rulings, or conclusions and recommendations. The Board should adopt the ALJ's findings because "[a]ny exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived" under Section 102.46(b)(2) of the Board's Rules and Regulations.

Respondent's bare exceptions should be disregarded. Respondent's brief in support of its exceptions is replete with facts not supported by any evidence, fallacious inferential leaps from such unsupported facts, arguments not supported by case law and even one crucial misrepresentations of case law, and contentions irrelevant to matters before the Board. To the extent that Respondent's exceptions fail to comply with the requirements of Section 102.46(b) of the Board's Rules and Regulations by failing to state, either in its exceptions or its supporting brief, on what grounds the purportedly erroneous findings or conclusions should be overturned, such exceptions should be disregarded. *Sunshine Piping, Inc.*, 351 NLRB 1371, 1371 n.1 (2007)(Board disregarded "bare exceptions" that were unsupported by argument); *New Concept Solutions, LLC*, 349 NLRB 1136, 1136 n.2 (2007)(Board disregarded bare unsupported exceptions to judge's findings of violations); *Carson Trailer, Inc.*, 352 NLRB 1274, 1274 (2008)(2-member Board)(Board found that respondent's exceptions arguing there was "insufficient evidence" to support the violations and the "evidence [did] not support" and the judge's determination did not meet the minimum requirements of Section 102.46(b) of the Board's Rules and Regulations, and disregarded respondent's exceptions pursuant to Section 102.46(b)(2)). To the extent that Respondent's brief in support of its exceptions contains matters

not included within the scope of exceptions and Respondent's arguments fail to contain the required "points of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on," Respondent's exceptions should similarly be disregarded. Board's Rules and Regulations, §§ 102.46(b)(2), 102.46(c)(3).

The ALJ's decision rests on solid credibility determinations, the overwhelming weight of the evidence, and well-established Board and court precedent. Accordingly, the Charging Party respectfully requests that the Board deny all of Respondent's exceptions.

**B. PARTICIPATION IN THE APRIL 15, 2015 STRIKE WAS PROTECTED ACTIVITY UNDER THE ACT BECAUSE, AS A MATTER OF LAW, THE STRIKE WAS NOT PART OF A PLAN OR PATTERN OF INTERMITTENT ACTION INCONSISTENT WITH A GENUINE STRIKE. ACCORDINGLY, EYM DISCRIMINATED AGAINST THE CHARGING PARTY AS A RESULT OF ITS ENGAGING IN PROTECTED CONCERTED ACTIVITIES.**

Charging Party's April 15<sup>th</sup>, 2015 strike was a protected concerted activity and not an intermittent strike. Respondent argues that the ALJ, in concluding that the Charging Party's April 15<sup>th</sup>, 2015 strike was a protected concerted activity, failed to follow decades of "uniform, consistent Supreme Court and Board precedent." While Respondent is correct that decades of uniform, consistent Supreme Court and Board precedent exist regarding intermittent strikes, the Respondent fails to show how or why the Charging Party's April 15<sup>th</sup>, 2015 single strike constitutes an unprotected, intermittent strike in accordance with the law. Respondent seeks to upturn and eviscerate the long-held precedent, on which it allegedly depends, to forge its argument by asking the Board to severely diminish a workers' right to strike in our modern economy and contrary to long-held precedent.

Section 7 of the Act protects the right of employees to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. The cornerstone principal, sacrosanct in the regulatory framework of protecting a workers’ right to organize for mutual aid or protection is the right to strike. Strikes are the essence of protected concerted activity under the Act. The strike is one of the principal forms of protected concerted activities under the Act, defined as “any strike or other concerted stoppage of work by employees...and any concerted slow-down or other concerted interruption of operations by employees.” 29 U.S.C. § 142. The Board presumes strike activity is protected absent compelling evidence that it “is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike.” *Polytech, Inc.*, 195 N.L.R.B. 695, 696 (1972).

The long-held, bedrock principals enshrined in the Act and in decisions by the courts and Board regarding a worker’s right to strike stand squarely in opposition to the new ways in which Respondent is asking this board to apply the intermittent strike doctrine to narrow a worker’s right to strike. The ALJ correctly decided that the Charging Party did not engage in an intermittent strike consistent with this lasting precedent by correctly applying and considering the many and various factors established within this lasting jurisprudence. The Charging Party’s strikes were not close enough together in time to be unprotected. The strikes were not part of a common plan intended to harass the employer into a state of confusion. The strikes were not undertaken by unionized employees in furtherance of a bargaining strategy. The objectives of each of the various work stoppages were not identical. The work stoppages did not attempt to reap the benefit of continuous strike action without assuming the vulnerabilities of a forthright and continuous strike.

While the Charging Party is confident that this Board will find their conduct protected given especially the long history of substantially similar and identical strike activity being protected under the Act, the Board and the law do not operate in a vacuum. The nature of work itself in our nation has dramatically changed. Since February 2010, when U.S. employment hit bottom, until February 2014, 44% of U.S. employment growth occurred in low-wage industries such as fast-food.<sup>1</sup> Some estimates indicate that 2 out of every 10 U.S. food service and production jobs have such irregular shifts that they cannot specify a time of day at which they regularly work each week.<sup>2</sup> The majority of workers with nonstandard work schedules, 55%, cite involuntary factors, such as “could not find other job” or it is “the nature of the job” as reasons for working nonstandard hours.<sup>3</sup> Sixty percent of all workers with nonstandard schedules have earnings below the median of the typical American workers, and 40 percent have earnings that are lower than those of 75 percent of all workers.<sup>4</sup> One in four workers with wages at or below the median U.S. wage works on a nonstandard schedule.<sup>5</sup> Of U.S. workers with weekly earnings lower than those of 75% of the population who work full time, 28 percent work most of their hours on a nonstandard schedule.<sup>6</sup>

These real world trends have profound implications for not only the nature of work itself within our nation, but also for the ways in which our laws should apply. Based on a work schedule from the 1960s, Respondent’s antiquated, blanket assumptions misapplied to the

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<sup>1</sup> *The Low-Wage Recovery: Industry Employment and Wages Four Years into the Recovery*, DATE BRIEF, NATIONAL EMPLOYMENT LAW PROJECT, April 2014, [www.nelp.org/content/uploads/2015/03/Low-Wage-Recovery-Industry-Employment-Wages-2014-Report.pdf](http://www.nelp.org/content/uploads/2015/03/Low-Wage-Recovery-Industry-Employment-Wages-2014-Report.pdf).

<sup>2</sup> Golden, Lonnie, *Irregular Work Scheduling and Its Consequences*, April 9, 2015, <http://www.epi.org/publication/irregular-work-scheduling-and-its-consequences/>.

<sup>3</sup> Enchautegui, Maria, *Nonstandard Work Schedules and the Well-Being of Low-Income Families*, URBAN INSTITUTE, July 2013, <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412877-Nonstandard-Work-Schedules-and-the-Well-being-of-Low-Income-Families.PDF>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

modern nature of work for low-wage workers might make some degree of sense. Respondent assumes that it would be possible for the workers who went on strike on April 15<sup>th</sup>, 2015, to pursue a common plan or purpose, when in fact, it is nearly impossible because they are typically unaware of their work schedules long-term. How can one intend to harass an employer into a state of confusion through engaging in strikes if he or she is totally unaware when or if he or she will be working the next week? Unpredictable work schedules were one of the Charging Party's specific reasons for striking. ALJD P20, L38-41.

Fast-food and other low-wage workers, like the workers disciplined by Respondent, are typically unaware of when, whether, and how many hours they will work each week. These workers had announced the April 15<sup>th</sup> strike months before, unaware of their schedules for that day and therefore unaware of the impact it would have on their employer. Moreover, they are often unaware of anyone else's schedule. As was the case here and as the ALJ concluded, Respondent presented absolutely no evidence indicating that these workers intended to harass Respondent into a state of chaos or that Respondent was, in fact, harassed into a state of chaos. ALJD P19, L20-44; P20, L1-6.

**i. EMPLOYER FAILED TO PROVE, AS A MATTER OF LAW, THAT THE APRIL 15<sup>TH</sup> STRIKE WAS INTERMITTENT STRIKE**

The ALJ properly concluded that the discriminatees' activities did not meet the definition of "intermittent strike" under the multiple factors applied in such an analysis. The Act expressly recognizes the "right to strike" in § 13 (29 U.S.C. § 163) and it is bedrock labor jurisprudence that strikes are the essence of protected concerted activity. Consequently, the Board presumes strike activity is protected absent compelling evidence that it "is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike." *Polytech, Inc.*, 195 N.L.R.B. 695, 696 (1972).

A strike will be deemed intermittent only when the employer proves that the actions were “intentionally planned and coordinated so as to effectively reap the benefit of a continuous strike action without assuming the economic risks associated with a continuous forthright strike.” *WestPac Elec, Inc.*, 321 NLRB 1322, 1360 (1996); *see National Steel and Shipbuilding Co.*, 324 NLRB 499, 510 (1997), *enfd.*, 156 F.3d 1268 (D.C.Cir. 1998); *Honolulu Rapid Transit Co.*, 110 NLRB 1806, 1807 (1954). There is no one factor which determines absolutely whether a work stoppage is an unprotected, intermittent strike. Rather, the Board evaluates many factors, including the frequency and timing, whether the strikes were part of a common plan, whether the employees were already represented by a union, whether the strikes were intended to harass the employer into a state of confusion, whether the strikes were for distinct acts of the employer, and whether the strikers intended to “reap the benefits of strike action without assuming the vulnerabilities of a forthright and continuous strike.” *WestPac Elec., Inc., supra* (citing *John S. Swift Co.*, 124 N.L.R.B. 394, 396 (1959), *enfd.* 277 F.2d 641 (7th Cir. 1960); *First National Bank of Omaha*, 171 N.L.R.B. 1145 (1968), *enfd.* 413 F.2d 921 (8th Cir. 1969); and *Audubon Health Care Center*, 268 N.L.R.B. 135 (1983).)

Finally, where, as here, the record clearly shows that an employee engaged in concerted activity for purposes of mutual aid and protection, the Board treats the claim that the activity was unprotected because it was intermittent as an affirmative defense, which it is the Respondent’s burden to prove. *Care Ctr. of Kan. City*, 350 N.L.R.B. 64, fn. 3 (N.L.R.B. 2007). *See also* 2004 NLRB GCM LEXIS 89 (quoting *Polytech, Inc.*, 195 N.L.R.B. 695, 696) (“a refusal to work will be considered unprotected intermittent strike activity ‘when the evidence demonstrates that the stoppage is part of a plan or pattern or intermittent action which is inconsistent with a genuine

strike or genuine performance by employees of the work normally expected of them by the Employer.’’).

The intermittent strike doctrine is fact-dependent and requires detailed argument and the presentation of evidence. Thus, it should be emphasized that the Respondent bore the burden of demonstrating that the discriminatees’ strike activity was unprotected. Respondent failed to meet that burden. The Respondent presented no clear and convincing evidence to prove its far-fetched conspiracy claims. Since the discriminatees only engaged in one strike against Respondent and Wise was never employed by Respondent, their activity clearly does not fall within the narrow exception of strike activity contemplated by the intermittent strike doctrine.

**ii. AS A MATTER OF LAW, THE VERY FACTUAL FINDINGS OF THE ALJ DID NOT ESTABLISH THAT THE APRIL 15<sup>TH</sup> STRIKE WAS AN UNPROTECTED INTERMITTENT WORK STOPPAGE BY WHICH THE EMPLOYEES AND THE UNION ATTEMPTED TO ARROGATE TO THEMSELVES THE RIGHT TO DICTATE EMPLOYEE SCHEDULES AND HOURS**

The ALJ properly concluded that the April 15<sup>th</sup> strike was a protected concerted activity under the Act. The ALJ’s credibility determinations, which were proper, simply did not conclude that the Charging Party engaged in a common plan to harass the employer into a state of confusion or to solely set the terms and conditions of employment as Respondent indicates. Respondent illogically infers, without clearly specifying how or why, that the ALJ’s own findings establish: (1) the existence of a nationwide union campaign for common purposes; (2) a series of intermittent one-day work stoppages, not only nationally but also seven in Kansas City, in furtherance of that common strategy; (3) a common plan in each stoppage of attempting to dictate when employees would walk off and back on to the job; and (4) the April 15<sup>th</sup> strike was part of that nationwide campaign organized by the union. At no point during the hearing or in the ALJ’s decision were any of Respondent’s inferential claims directly admitted or established.

After making this fallacious inferential leap, Respondent reaches to apply the idea that the Charging Party was attempting to have the power to solely determine work stoppages and set their own terms and conditions of employment in defiance of their employer's authority to do so.

Certainly Respondent is not arguing here that the existence of a nationwide campaign for common purposes somehow eviscerates workers' rights to organize. What would be the point of collective organization without a collective? The existence of a common purpose of workers engaging in concerted activities is assumed by and protected under the Act.

That Respondent claims the purpose of the striking employees' activity was to dictate when employees would walk off and back onto the job is absurd. Multiple witnesses cited the purposes of their concerted activities and this was not one of those reasons, as the ALJ credibly found. Moreover, the common plan to which Respondent refers is merely to assist workers regarding their many and various concerns, which is hardly the type of "common plan" that rises to the level of an intention to harass the employer into a state of confusion or to set the terms and hours of employment in arrogation of an employer's right. The requirement of a "plan or pattern" calls into question the motive and state of mind of the striking employees, and at no point during trial was it established that the workers' had such an improper state of mind. Wise defined their organization and efforts as "a city-wide organization of fast food workers and other low wage workers who have been organizing...in Kansas City for \$15 an hour and the right to form a Union without retaliation," and is also called the Fight for \$15. Tr. 30 (Wise). These fast food and low wage workers organize rallies and strikes to assist workers to receive better pay and better treatment in fast food and low wage jobs. Tr. 31 (Wise).

The workers of WOC-KC engaged in several other activities to assert their rights on the job to their employers. For example, in March 2015, WOC-KC workers campaigned against health

and safety violations in their restaurants in Kansas City, Missouri, demanding first aid kits, protective equipment while they were doing hazardous tasks at work, and repairs to broken equipment such as grease traps and water hoses. Tr. 45-46 (Wise); Tr. 199-201, 210 (Ortiz). Worker-members of WOC-KC, such as Terrance Wise, Suzana De La Cruz Camillo, West Humbert, and Osmara Ortiz, signed, read aloud, and submitted a petition to their store manager, Respondent's employee LaReda Hayes, demanding such protections and repairs. Tr. 46-47 (Wise); Tr. 199-201, 210 (Ortiz). These many facts credited by the ALJ and established at trial do not amount to the type of "common plan" illustrating an intention to harass the employer into a state of confusion or to set the terms and conditions of employment.

Respondent's many uncouth ad hominem attacks against the ALJ reach a startling crescendo when Respondent claims the ALJ "improperly applied her own self-imposed judicial gloss on the two requirements to establish that a work stoppage is an unprotected intermittent action." Instead of analyzing the breadth of authority—what Respondent calls the ALJ's "judicial gloss"—Respondent merely asserts here that the only relevant consideration is whether the workers' alleged common plan was used to give the workers the power to solely determine work stoppages and set their own terms and conditions of employment. Clearly, the jurisprudence of intermittent strike analyzes far more factors than the one factor Respondent asks the Board to consider here.

Respondent misapplies and seeks to broaden the Board's holding in *Pac. Tel. & Tel. Co.*, that it is "the inherent character of the method used [which] sets [a] strike apart from the concept of protected union activity envisaged by the Act." 107 NLRB 1547, 1550 (1954). Certainly, the inherent character of the method used is relevant, but it is merely one factor the Board has considered. Specifically, Respondent invents a new holding in *Pac. Tel. & Tel. Co.*, by claiming

that it is “not the legal ownership of the business by a succeeding purchaser, which determines whether a strike is an unprotected intermittent one.” That proposition simply does not exist anywhere in *Pac. Tel. & Tel. Co.*, expressly or implicitly. 107 NLRB at 1549-50.

*Pac. Tel. & Tel. Co.* held that the character of a union’s “hit and run” strikes with the stated intention to “harass the company into a state of confusion” was not protected activity. *Id.* at 1548, 1549-50. *Pac. Tel. & Tel. Co.* involved only *one* single employer. *See id.* at 1548-49. Its very limited holding is itself the authority precluding consideration in the intermittent strike analysis of a string of strikes of the same inherent character against *different employers*, which Respondent claims does not exist. Again, the case dealt with a single company, and the union in that case admittedly sought to harass “the company” into a state of confusion. *See id.* It is significant that in *Pac. Tel. & Tel. Co.*, (i) the workers were represented by a union already and (ii) the purpose of harassing the employer into a state of confusion regarded contract negotiations. Strike activity has been more likely to be protected where, as here, employees are unrepresented and no union is available through which to prosecute their grievances. *E.g.*, *Johnnie Johnson Tire Co.*, 271 NLRB 293, 294; *Polytech*, 195 NLRB at 696; *First Nat’l Bank of Omaha*, 171 NLRB 1145, 1151 (1968), *enf’d*, 413 F.2d 921 (8<sup>th</sup> Cir. 1969).

Although there is no clear definition of what constitutes intermittent strikes, the Board has consistently held that engaging in two one-day work stoppages alone is generally insufficient evidence to render the activity unprotected under Section 7. *Chelsea Homes, Inc.*, 298 NLRB 813 (1990); *Robertson Industries*, 216 NLRB 361, 362 (1975); *NLRB v. Robertson Industries*, 540 F.2d 396 (9<sup>th</sup> Cir. 1976) (finding two one-day work stoppages in three months did not give rise to a repeated pattern of half-strikes). In *Chelsea Homes*, unorganized employees engaged in two one-day work stoppages and the Board upheld the ALJ finding that “two work stoppages,

even of like nature, are insufficient to constitute evidence of a pattern of recurring, and therefore unprotected, stoppages.” 298 NLRB 831. Similarly, in *Robertson Industries*, the Board determined that unorganized employees, who also engaged in two work stoppages, were protected. 216 NLRB at 362. With respect to the number of stoppages required for a pattern, the Board stated:

While there is no magic number as to how many work stoppages must be reached before we can say that they are of a recurring nature, certainly the two work stoppages in the case at bar, which involved a total of 2 day's absence from work, do not, in our opinion, evidence the type of pattern of recurring stoppages which would deprive the employees of their Section 7 rights. *Id.*

In each case, the number of strikes for the purposes of determining intermittent conduct was the number of times specific employees struck against their employer. *See, e.g., Crenlo*, 215 NLRB 872, 879 (1974)(articulating relevant analysis was of the discriminatees’ strike conduct against employer). Despite this clear principle, Respondent has indicated that strikes against other fast food employers, including those that occurred in New York City prior to the formation of WOC-KC should also be considered. Respondent Brief at 8. (“[T]he April 15, 2015, strike was the *ninth* in a series of one-day strikes nationally since November 29, 2012, and the *seventh* in Kansas City since July 2013,” emphasis in original.) This method of calculation directly contravenes longstanding Board precedent that unprotected strike conduct concerns the discriminatee and his employer, not other entities. As evidence of the number of strikes, Respondent EYM supplies news articles which detail all strikes at fast food locations. *Id.* This evidence demonstrates that EYM employees have only struck Respondent’s Burger King locations at 3441 Main St, Kansas City, Missouri and 1102 East 47<sup>th</sup> Street, Kansas City, Missouri one time. Although employees of the former Burger King locations at 1102 East 47<sup>th</sup> Street, Kansas City, Missouri and 3441 Main St, Kansas City, Missouri struck in the past, those

employees were employed by Strategic, a franchisee and predecessor to Respondent, for most of the strikes Respondent's evidence cites, and were not employed by Respondent EYM but for one strike. Respondent cites no precedent to support the argument that strikes against other employers in the same industry could constitute intermittent strikes. Unless EYM is conceding joint employer status with the corporate entity, there is nothing tying the protected activity directed at Strategic to the April 15, 2015 strike against Respondent EYM.

Many cases have cited the proposition that one strike alone, as occurred in the case at bar, is not enough to establish a violation of the employer's Section 7 rights. Despite Respondent's unfounded contention, the ALJ's determination about the number of strikes was rooted soundly in well-founded jurisprudence and was not merely "self-imposed judicial gloss."

***a. FREQUENCY AND TIMING OF STRIKES***

**The strikes were not close enough together in time to be unprotected.**

The ALJ correctly held that none of the factors Respondent argued that existed here under the "frequency and timing" factor were present in the case at hand. ALJD P19, L5-10. Respondent asks the Board to depart with decades of precedent to determine that the only consideration it should make in determining intermittent strike is "the inherent character of the method used [which] sets [a] strike apart from the concept of protected union activity envisaged by the Act." *Pac. Tel. & Tel. Co.*, 107 NLRB at 1550. As discussed previously, Respondent reads into *Pac. Tel. & Tel. Co.* facts and law that simply do not exist. *Pac. Tel. & Tel. Co.* involved a single employer and a union fighting for a contract with the admitted intent to "harass the company into a state of confusion." 107 NLRB at 1549-50. The case is, in no way, analogous to the present case.

Second, despite Respondent's contention, the ALJ did not summarily dismiss "the universally expressed intent of the employees and unions to continue engaging in hit-and-run one day strikes" because no such evidence exists. This represents yet another in a series of Respondent's fallacious inferential leaps.

Respondent seeks to obfuscate the truism that a single work stoppage simply cannot be "intermittent" and accordingly that a single concerted work stoppage is therefore protected. *E.g.*, *Johnnie Johnson Tire Co.*, 271 NLRB 283 (1984); *Polytech*, 195 NLRB at 696. The ALJ properly decided that the only factor Respondent cites as being relevant, "the inherent character" of the strike, did not meet the requirement for intermittent strike. The ALJ also properly concluded that a one day strike simply does not amount to an intermittent strike. Regardless, the frequency and timing of the Charging Party's protected activities do not run afoul of the intermittent strike doctrine.

In addition to number, the Board considers the proximate timing between strike actions. *See Eg. Honolulu Rapid Transit Co.*, 110 NLRB 1806, 1807 (1954) (finding four strikes on consecutive weekends unprotected in part due to frequency of the work stoppages). The Board has yet to find that a series of stoppages similar in timing to that at issue here—that is, four one-day strikes over the course of almost a whole year—are unprotected. Rather, the timing of these strikes materially resembles those considered in *University of Southern California* (five strikes over two years), in which the General Counsel noted that "the large gaps in time between the strikes" suggested that strikes were protected even if "no distinct motivating events can be shown for each of the five strikes." *Supra*, Case No. 31-CA-23538, 1999 NLRB GCM Lexis 35, (fn. 20) (April 27, 1999).

To reiterate, the discriminatees' strike activity while employed by Strategic, Respondent's predecessor, is irrelevant in analyzing their protected activity on April 15, 2015.

However, the April 15, 2015 strike would not lose its protection even if past strike conduct at the East 47th Street and 3441 Main Street stores were considered.

***b. WHETHER THE STRIKE'S INTENT WAS TO HARASS***

**The strikes were not part of a common plan intended to harass the employer into a state of confusion.**

The ALJ properly concluded that the discriminatees' work stoppages were not intended to harass the employer and that these discriminatees did not engage in "hit and run tactics" as defined in several court and Board decisions. The Board has only found work stoppages were intended to harass the employer when employees engaged in "hit and run tactics" deliberately calculated to prevent the employer from meeting its labor needs. *United States Service Industries*, 315 N.L.R.B. 285 (1994); *Pacific Telephone and Telegraph Company*, 107 NLRB 1547 (1954). In particular, the Board has found unprotected strike actions that were limited to the busiest hours of the work day or timed to prevent the employer from finding replacement workers. *Pacific Telephone, Supra* (1954); *Embossing Printers, Inc.*, 268 NLRB 710 (1984) *enf'd* 742 F.2d 1456 (6th Cir. 1984). For example, in *Pacific Telephone and Telegraph Company*, employees were found to have intended to harass the employer when they moved their picket line every few hours to different facilities in order to prevent the employer from being able to respond to the loss of labor. 107 NLRB 1547 (1954). The Board held that employees' "unpredictable strike and picket attacks" set "the strike apart from the concept of protected union activity envisaged by the Act." *Id.* at 1549-1550. In *Embossing Printers, Inc.*, the employees timed their two-hour strikes to coincide with the busiest parts of the work day in a deliberate effort to cause chaos. *Supra*. Similarly, in *LandMark Elec.*, the General Counsel advised that a series of strikes for less than one (1) hour in a single day involving picketing were designed to

harass the employer and were thus unprotected. *Supra*, Case No. 31-CA-21751, 1996 N.L.R.B. GCM LEXIS 12 (May 17, 1996).

The mere fact that a work stoppage creates a labor shortage does not render it unprotected. *See United States Service Industries*, 315 N.L.R.B. at 285. For instance, in *USSI*, the Board found there was no evidence that strikes were designed to "harass the company into a state of confusion" where the employer was left with half of its night cleaning staff. *Id.* at 289 ("he awarded 20 bonuses to employees who worked the night of the strike because they performed twice their usual amount of work due to the employee shortage").

While employees' strike activity may have resulted in Respondent having insufficient staff, the strikes were not part of an intentional effort to create chaos. First, employees struck for their entire scheduled shift. Tr. 185 (Humbert); Tr. 203 (Ortiz); Tr. 218 (Jones). Unlike the employees in *Embossing Printers* and *Landmark*, discriminatees did not leave their stations during peak hours and return before their shift ended. Tr. 203: 2-6 (Ortiz). Because the discriminatees were also on strike when employer's labor demand was low, there is no evidence to suggest that the strikes were intended to create chaos during peak business hours. *See id.* Moreover, the employees clearly had no deliberate design to prevent Respondent from finding replacement workers. The union provided notices that identified which employees were striking and apprised Respondent when they would be returning to work. GC Ex. 21-23, 25, 26. Further, the union's strikes could not fairly be characterized as surprise work stoppages. Unlike the "unpredictable strike and picket attacks" employees used in *Pacific Telephone*, WOC-KC's strikes were public knowledge days if not weeks in advance. For instance, the union announced its April 15, 2015 strike over two weeks before the date. GC's Ex. 3. The strike received national and local media coverage. GC's Ex. 3, 6. Because management knew which workers

had participated in past strikes, they were well positioned to develop contingency plans to address labor shortages. *See* Tr. 331:20 to 338:8. Labor shortages are incidental to strike activity. The fact that the employer had trouble meeting its staffing needs on the national strike days is not evidence that employees intended to harass the employer into a state of confusion.

***c. UNION INVOLVEMENT AND WHETHER STRIKE WAS PART OF A COMMON PLAN***

**The strikes were not undertaken by unionized employees in furtherance of a bargaining strategy.**

The ALJ properly found that the evidence did not support the idea that the strike was part of a common plan by WOCCK to exert additional economic pressure on Respondent to accede to their demands. In the few cases where multiple work stoppages have been found to be unprotected, they were undertaken in furtherance of a deliberate bargaining strategy to engage in repeated work stoppages until a satisfactory contract was reached. *Care Center of Kansas City*, 350 NLRB 64 (2007) (strikes part of union bargaining strategy); *National Steel and Shipbuilding Co.*, 324 NLRB 499, 508 (same); *Pac. Tel. & Tel. Co.*, *supra* (workers engaged in numerous “hit and run” stoppages over short time frame, and union’s stated intention was to “harass the company into a state of confusion” so they would sign contract); *Honolulu Rapid Transit Co.*, *supra* (union announced plan to strike every weekend until contract dispute was resolved, admitted plan to strike on weekends was designed to “turn the tables on the [Employer]” by disrupting operations while protecting workers from serious economic loss). Conversely, repeated stoppages by workers without union representation and which have not been taken in furtherance of a bargaining strategy have been found protected. Accordingly, the General Counsel has rejected an intermittent strike defense where the strikes were not part of an articulated strategy by the union to engage in neither a strike nor work to secure advantage at the

bargaining table, even when the strikes were far more frequent than those here at issue. *Norfolk Shipbuilding*, 1990 NLRB GCM LEXIS 81 (Nov. 7, 1990) (9 strikes within 23 days).

The strikes that the discriminatees have participated in were not related to any attempt to gain bargaining leverage against Respondent or their previous employer. The discriminatees are not unionized nor has WOC-KC asked to be recognized as EYM employees' bargaining representative. Each strike notice delivered to the store contains a disclaimer that the union was "not making a present demand for recognition at this time" GC's Ex. 21-26. In sum, the evidence plainly does not support a finding that discriminatees' strike activity was in furtherance of a collective bargaining objective or undertaken as part of a unionized workforce. The ALJ correctly found that "there is no evidence that WOCKC has a strategy of using the strike (or even if I were to consider the past strikes under Strategic's ownership) to harass the Respondent during ongoing collective-bargaining negotiations or any negotiations for higher minimum wages or changes to other terms and conditions of employment." ALJD P20, L23-26.

***d. WHETHER STRIKE TAKEN TO ADDRESS DISTINCT ACTS OF THE RESPONDENT***

**Objectives of Stoppages Are Not Identical**

The ALJ correctly found that in addition to striking to advocate for a higher minimum wage, discriminatees participated in the April 15<sup>th</sup> strike to protest distinct grievances they had against Respondent. ALJD P20, L30-37. Specifically, the ALJ cited the strike notice submitted by discriminatees indicating that workers had been subject to injury because of lack of protective equipment and that they were protesting "unfair labor practices, unsafe working conditions, unpredictable scheduling and wage theft occurring here." ALJD P20, L38-41. Beyond the strike notice, which Respondent failed to establish was "boilerplate," discriminatees like Wise specifically testified at trial regarding workers' health and safety protests. GC's Tr. Ex. 21-26

The Board has found multiple strikes were protected when each walkout is at least partially motivated by a distinct workplace grievance. *Westpac*, 321 NLRB 1322, 1360; *Blades Manufacturing Co.*, 344 F.2d 998 (8th Cir. 1965). In *Westpac*, employees engaged in three separate strikes over a two week period. The first strike was in pursuit of economic aims while the second and third strikes were in response to the unfair labor practices employer committed in retaliation for the first strike. *Supra*. The Board ultimately rejected the employer's intermittent strike defense since "each strike was 'unique to its facts and circumstances.'" *Id*.

Here, each of the discriminatees' strikes had a unique objective and was in response to specific conduct of their employer. How Respondent can claim that the ALJ's conclusions are "legally and factually incorrect" is unclear. In previous strikes in which Wise and other discriminatees participated against Strategic, other concerns were at issue, such as the "dignity of labor," payment of poverty and "starvation wages," and workplace discrimination. *See* Respondent's Ex. 2, 8; GC. Ex. 4; Tr. 77, 88, 90 (Wise). On April 15th, employees struck over EYM's failure to remedy health and safety violations it had identified during Strategic's ownership and its retaliation against Wise. GC's Ex. 21-26. The April 15th strike notice cites the OSHA violations stating "we are particularly concerned about ensuring a safe workplace. Here in Kansas City, workers have been subject to burns, lack of protective equipment, lack of first aid kits, and more." GC's Ex. 21-26. The notice also explicitly states that the strike is to "protest unfair labor practices." *Id*. It was the Respondent's burden to prove that such notices were "other than boilerplate" and it failed to prove that at trial. The discriminatees' strike activity has been in solidarity with fast food workers across the United States and in support of the national campaign's broad goal of raising industry standards. However, the national strikes were also a platform for the discriminatees to protest issues specific to their employer and store.

Because the union clearly articulated, and Respondent failed to refute, the distinct motivations for each strike in the notices it provided to the employer, there should be no dispute that each work stoppage was motivated by a distinct grievance.

***e. WHETHER EMPLOYEES INTENDED TO REAP THE BENEFITS OF A STRIKE WITHOUT RISK***

**The work stoppages did not attempt to reap the benefit of continuous strike action without assuming the vulnerabilities of a forthright and continuous strike.**

The ALJ properly found no evidence that Respondent faced a legal barrier to permanently replacing the striking employees and that these employees did not participate in the one-day strike as a way of reaping the benefits of a strike without assuming its risks. ALJD P21, L17-29. Another factor of unprotected, intermittent striking is if the employees seek to harm the employer's interests to the same extent as a continuous strike without assuming the vulnerabilities this would normally entail. *WestPac Elec., Inc.*, supra. In *John S. Swift Company*, employees refused to work overtime. 124 NLRB 394, 396, enf'd. 277 F.2d 641 (7th Cir. 1960).

This activity was found to be unprotected because they were thereby able to continue to draw their non-overtime wages while crippling the employer's operations. Similarly, nurses who refused reasonable assignments but continued to work on other assignments of their choosing were deemed to be engaged in unprotected activities. *Audubon Health Care Center*, supra. An essential fact is that the employees continued to receive all or most of their pay while determining the terms on which they would work. Their withholding of labor was not "complete." *Id.*, See also *N. L. R. B. v. Montgomery Ward & Co.*, 157 F. 2d 486 (8th Cir. 1946). *Valley City Furniture* is another example where repeated refusals to work overtime were deemed unprotected because they reap the benefit of strike action without the vulnerabilities of a forthright and continuous strike. 110 NLRB 1589 (1954).

All of these cases are easily distinguishable from the strikes involved in this case. This factor is designed to withhold protected status from strike activity where employees withhold some of their labor while continuing to draw a salary. Unlike the employees in *Audobon Health Care* and *Valley City*, the discriminatees here were not refusing to perform specific tasks while they were on the clock. Nor were they withholding their work only during specific parts of their shift. Consequently, the discriminatees assumed the normal vulnerabilities of reduced pay and the risk of replacement each time they participated in a strike.

It is worth noting that strikes do not lose their protection when they are designed “to provide an incentive for employees to participate (by minimizing personal hardship).” *Care Center of Kansas City*, 350 NLRB at 67. Missing one day’s pay and risking retaliation are both significant sacrifices for a low wage worker. While discriminatees’ past strike activity has been limited to one day and may have reduced strikers’ loss of pay and the risk of permanent replacement, they still assume the risk of a forthright and continuous threat or hardship when they walk off their shift.

In sum, the discriminatees one-day work stoppage on April 15th in no way resembles the type of strikes that have been found unprotected under the intermittent strike doctrine. Nor would it do so even if discriminatees’ strike activity against Strategic were considered. As such, the ALJ properly concluded that discriminatees did not engage in an unprotected intermittent strike and Respondent’s exceptions regarding intermittent strike should be denied.

**C. THE ALJ PROPERLY CONCLUDED, AS A MATTER OF LAW, THAT THE GENERAL COUNSEL MADE OUT A PRIMA FACIE CASE OF DISCRIMINATION AND RETALIATION AGAINST CAMILLO, HUMBERT, AND ORTIZ BECAUSE THERE WAS DIRECT EVIDENCE THAT HAYES HAD KNOWLEDGE THESE THREE EMPLOYEES ENGAGED IN PROTETED ACTIVITY.**

The ALJ properly concluded that Hayes was aware and should reasonably have been aware that Camillo, Humbert, and Ortiz were not at work because they were on strike on April 15<sup>th</sup>. ALJD P22, L10-30. The ALJ correctly found that there is no evidence that Hayes did not receive the return to work notices provided for all six employees. *Id.* Moreover, the ALJ upheld longstanding precedent in determining that the very conduct for which the employees here were discriminated is itself protected concerted activity. In addition, Respondent failed to sustain its burden to show the existence of a lack of unlawful animus.

Respondent unequivocally and unlawfully discriminated against several employees at its store location at 47<sup>th</sup> Street and Troost Avenue, immediately after they engaged in a protected concerted strike. Respondent's attempts to disprove discrimination against these employees suffer from a fatal flaw: Respondent's manager Hayes admits to writing up employees after engaging in the strike. ALJD P 22, L29-30; L16-19. Most importantly, the law is well settled, these workers had absolutely no obligation to provide Hayes with any notice whatsoever before engaging in a strike telling Respondent that they were going to be on strike. Should Hayes's testimony that she never received any notice be believed, against the testimonies of Humbert, and Ortiz, her history of anti-union animus through having been named in several discrimination complaints before the NLRB is well documented and should serve to impeach her credibility when Hayes's testimony conflicts itself, as it does here. As previously stated, Hayes's entire testimony was discredited because of prior inconsistent testimony. Tr. 329-331, 376: 21-25, 377-378 (Hayes).

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) prohibits employer "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Thus, an employer violates Section 8(a)(3)

and (1) of the Act (29 U.S.C. §158(a)(3) and (1))<sup>3</sup> by discharging or taking other adverse action against an employee for engaging in union or other protected concerted activities. *E.C. Waste, Inc. v. NLRB*, 359 F.3d 36, 41 (1st Cir. 2004).<sup>7</sup>

Whether a discharge or adverse action violates Section 8(a)(3) of the Act depends on the employer's motive. In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Supreme Court approved the test for determining unlawful motivation first articulated by the Board in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 89 (1st Cir. 1981). Under that test, a violation of the Act is established where the Board's General Counsel has shown that an employer's opposition to union or other protected activity was "a substantial or motivating factor" for the discharge or other adverse action. *See Transportation Management Corp.*, 462 U.S. at 401. *See also McGaw of Puerto Rico, Inc. v. NLRB*, 135 F.3d 1, 8 (1st Cir. 1997) (quoting *NLRB v. Horizon Air Services, Inc.*, 761 F.2d 22, 27 (1st Cir. 1985)). If the General Counsel meets these requirements, the burden then shifts to the employer to prove, by a preponderance of the evidence, that it would have taken the same action even in the absence of the union or other protected activity. *See Transportation Management Corp.*, 462 U.S. at 402-03 (1983); *see also E.C. Waste, Inc.*, 359 F.3d at 42; *McGaw of Puerto Rico*, 135 F.3d at 8. As the ALJ properly concluded, General Counsel met her burden and, after that burden shifted to Respondent, Respondent failed to establish by a preponderance of the evidence that it would have taken the same action absent the workers' protected activity.

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<sup>7</sup> Section 7 of the Act (29 U.S.C. § 157) confers on employees "the right to self-organization, to form, join, or assist labor organizations . . . ." Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), in turn, makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. Because antiunion discrimination necessarily "coerces employees in the exercise" of their rights under Section 7, "a violation of [Section] 8(a)(3) constitutes a derivative violation of [Section] 8(a)(1)." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

In evaluating Respondent's actions, it is appropriate to examine the entire record and consider circumstantial evidence to determine whether an inference of an unlawful motive is warranted. See, e.g., *Fluor Daniel, Inc. (Fluor Daniel I)*, 304 NLRB 970, 970 (1991); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Evidence of a discriminatory motive may be established by a number of factors including timing, threats, or other unlawful statements, and Respondent's reliance on fabricated defenses. See, e.g., *C.P. Associates, Inc.*, 336 NLRB 167, 167 (2001); *Power Equipment Company*, 330 NLRB 70, 74 (1999); *Shattuck Denn Mining*, *supra* at 470.

Susan De La Cruz Camilo, Kashanna Coney, Myreisha Frazier, West Humbert (Tr. 150-151 (Humbert)), Osmara Ortiz (Tr. 189-90 (Ortiz)), Myeisha Vaughn work for Respondent at its 47<sup>th</sup> and Troost Avenue Burger King location, where Hayes serves as the manager. Tr. 266-268 (Thatch); Tr. 354-355 (Hayes); Respondent's Ex. 25; GC's Ex. 41. On April 15, 2015, Coney, De La Cruz Camillo, Frazier, Humbert, Ortiz, and Vaughn, while employees of Respondent, went on strike from Respondent's 47<sup>th</sup> and Troost Avenue Burger King location. Tr. 162 (Humbert); Tr. 193: 5-11, 203 (Ortiz); GC Ex. 21; Tr. 266-268 (Thatch); Tr. 354-355 (Hayes); Respondent's Ex. 25; GC's Ex. 41. Store manager Hayes was aware that these workers were not present at work on April 15, 2015, because Hayes was provided with a "strike notice" in the morning of April 15<sup>th</sup>, signed by these workers, indicating why they were not present at work. Tr. 162-166 (Humbert); Ex. 21, 22, 36, 37, 38, 39; Tr. 193-95 (Ortiz); Tr. 354-355; Respondent's Ex. 25; GC's Ex. 41. Independent testimony confirms and Hayes admits outright that she was aware that Kashanna Coney, MyReisha Frazier, Myeisha Vaughn were on strike on April 15<sup>th</sup>, 2015, she merely claims that she did not receive their notice until 2:30 pm on April 15<sup>th</sup>, 2015. Tr. 266-268 (Thatch); Tr. 354-355 (Hayes); Respondent's Ex. 25; GC's Ex. 41. Hayes also

received a “return to work notice” signed by these workers indicating that they were returning to work after their strike. Tr. 162-166, 169; Ex 21, 22, 36, 37, 38, 39; Tr. 196-198 (Ortiz). Coney, De La Cruz Camillo, Frazier, Hubert, Ortiz, and Vaughn are all members of WOC-KC and the Fight for \$15 and a Union. Tr. 46-47 (Wise); Tr. 121, 125, 127; Tr. 142; Tr. 163 (Humbert); GC Ex. 2; Tr. 194-196 (Ortiz).

These employees’ all-day strike activity was clearly protected concerted activity for purposes of Section 13 protection under the Act. “It is well settled that a walkoff to protest working conditions is a protected concerted activity.” *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). As explained in *Burnup S. Sims, Inc.*, 256 NLRB 965 (1981), “the existence of or lack of unlawful animus” is not material when “the very conduct for which employees are disciplined is itself protected concerted activity.” *Burnup S. Sims, Inc.*, at 975. “Calling a strike ... an absence from work justifying discharge is to write Section 13 out of the Act.” *Anderson Cabinets*, 241 NLRB 513, 518, 519 (1979). Section 13 of the Act provides that “[n]othing in this Act ... shall be construed so as either to interfere with or impede or diminish in any way the right to strike....” Even if these employees failed to provide notice of their strike, the fact that the timing of these employees’ notice to strike did not meet Respondent’s no-call no-show policy is immaterial. Their failure to report to work was “a concerted action for mutual aid and protection.” *Lisanti Foods Inc.*, 227 NLRB 898, 902 (1977). *See also Iowa Packing Co.*, 338 NLRB 1140, 1144 (2003). A discharge or discipline of striking employees—purportedly for not calling in or showing up for work – amounts to a discharge or discipline for the act of going on strike and accordingly is unlawful. *CGLM, Inc.*, 350 NLRB 974, 979-980 (2007), *enfd* 280 Fed. Appx 366 (5<sup>th</sup> Cir. 2008). As established previously, any assertion that these workers’ activity was an unprotected “intermittent strike,” fails because the April 15<sup>th</sup>, 2015 strike was the first

and only strike these workers had launched against Respondent's Burger King locations herein described. *See Polytech, Inc.*, 195 NLRB 695, 696 (1972) (single refusal to work overtime is presumptively protected strike activity); *CL Frank Management*, 358 NLRB No. 111 (2012).

After striking on April 15, 2015, Coney, De La Cruz Camillo, Frazier, Hayes, Ortiz, and Vaughn returned to work on April 16<sup>th</sup>, 2015, and Hayes gave them a document to sign stating that they were being given a disciplinary write up. Tr. 174 (Humbert); Tr. 198-99 (Ortiz). Hayes claimed they were being written up because "they didn't have anybody to cover" their "shifts at the present time." Tr. 174 (Humbert); GC's Ex. 41. Hayes's actual written disciplinary action against these employees states the cause for discipline as "not showing for scheduled shift." GC's Ex. 41.

That Hayes was aware that these workers were engaging in a strike is not in question, and Respondent's claims to the contrary are wholly lacking in credibility. The ALJ rightly concluded that General Counsel demonstrated by a preponderance of the evidence that Hayes was acutely aware of these workers' many and various protected activities and participation in strikes similar to this one. ALJD P22, L10-30. First of all, Hayes admits outright to begin aware that Kashanna Coney, MyReisha Frazier, Myeisha Vaughn were on strike on April 15, 2015, she merely claims that she did not receive their notice until 2:30 pm that same day. Tr. 354-355; Respondent's Ex. 25; GC's Ex. 41. It is clearly no coincidence that Hayes selectively sought to enforce Respondent's attendance policy and discipline against all of these workers immediately after the strike. *See Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004) (explaining "it is well settled that the timing of an employer's action in relation to known union activity can supply reliable and competent evidence of unlawful motivation"). To rebut the fact that Hayes was aware that several workers were on strike on April 15, 2015, Respondent's counsel provided

Hayes with an exhibit, Respondent's Exhibit 25, to claim that Hayes was not aware that De La Cruz Camillo, Humbert, and Ortiz missed work on April 15, 2015 for a strike because their names were not on a particular strike notice. Tr. 354-355 (Hayes). However, two credible witnesses testified to Hayes having received *both* a strike notice and a return to work notice from all of these employees. Tr. 162-166, 169 (Humbert); GC's Ex. 21, 22, 36, 37, 38, 39; Tr. 193-195, 198 (Ortiz); Tr. 354-355; Respondent's Ex. 25; GC's Ex. 41. In addition, Hayes admits to knowing that De La Cruz Camillo (Tr. 333: 3-22 (Hayes)) and Humbert (Tr. 336: 1-16 (Hayes)) were members of the Union because their names were "on the list," referring to strike notices. Tr. 333-336 (Hayes). Moreover, Hayes's overall credibility in testifying on matters regarding this union should have been called into question by her relatively frequent past involvement in unfair labor practices charges filed with this Board. Tr. 47-50, 50-60 (Wise); GC's Ex. 9-18. She also impeached her own overall credibility as a witness by providing inconsistent testimony. Tr. 329-331, 376: 21-25, 377-378 (Hayes).

Respondent put on much evidence from managers of its *other* Burger King stores about the typical enforcement of its no-call no-show policy. Even if one believes Respondent's unsubstantiated claims about the typical enforcement of its attendance policy in its *other* stores, nothing in the record demonstrates that this motivated Hayes's action. See *General Thermo, Inc.*, 250 NLRB 1260, 1261 (1980) enf. denied 664 F.2d 195 (8th Cir. 1981) (explaining "[t]he existence of a justifiable ground... is no defense if it is a pretext used to mask an unlawful motive"). Yet, Hayes's testimony about her knowledge of the strike is inconsistent. She claims she did not know that De La Cruz, Humbert, and Ortiz were on strike before she disciplined them (Tr. 354-355 (Hayes)), then claims that she did know they were on strike before she disciplined them (Tr. 389-390 (Hayes); Tr. 162-166, 169 (Humbert); GC's Ex. 21, 22, 36, 37, 38,

39; Tr. 193-195, 198 (Ortiz); Tr. 354-355; Respondent's Ex. 25; GC's Ex. 41). The lack of any corroborating documents or testimony raises a strong inference that Respondent's entire defense, if any, regarding Humbert's and Ortiz's testimony, is not credible. As one Administrative Law Judge explained:

[A]n adverse inference may be drawn regarding the employer's "real" motive where the employer relies on "weak" evidence (e.g., the testimony of an agent that specific "business" reasons accounted for the allegedly unlawful action) where the employer is in possession of stronger evidence (e.g., relevant business records, or the testimony of other knowledgeable management agents) which would either corroborate or contradict the testimonial claim, but which the employer nevertheless fails to introduce. *Miramar Hotel Corp.*, 336 NLRB 1203, 1215 (2001) (citations omitted).

Respondent's discipline and conveniently timed enforcement of its policy has the effect of chilling employees' exercise of her Section 7 rights. Certainly, Hayes's discipline, based absolutely and indistinguishably on the fact that these workers went on strike, is clearly a rule applied to restrict the exercise of Section 7 rights. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). Moreover, the maintenance of this no-call no-show policy in regard to an employee going on strike, carried out in the manner in which Hayes applied it, would make it a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Hayes certainly purported to these workers that the threatened *enforcement* of this policy against them *because of* their having engaged in a strike, was promulgated in response to their engaging in protected activity. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

The application of the Act's long-held formula in this situation is straightforward. Coney, De La Cruz Camillo, Frazier, Humbert, Ortiz, and Vaughn engaged in a protected strike. They did not need to provide notice to Respondent in order that this strike receives the Act's protection under Section 13. They did, however, and credible testimony illustrates, provide strike notices on April

15th. The ALJ correctly held accordingly. Yet, Respondent's store manager Hayes disciplined them under Respondent's no-call no-show policy. Despite Hayes's inconsistent claims to the contrary, two credible witnesses testified to the fact that before they were disciplined, Hayes received both a strike notice and a return to work notice. It is not in dispute whatsoever that Hayes had knowledge that Coney, Frazier, and Vaughn were on strike. At best, the evidence Respondent presented was weak and wholly unrelated to the very store at which these workers were employed. Against the testimony of Humbert, Thatch, and Ortiz, Hayes's conflicting testimony wholly lacks credibility. Respondent's enforcement of its no-call no-show policy against these workers engaging in a protected strike clearly shows Respondent using the policy to chill employees' exercise of their Section 7 rights.

**D. AS A MATTER OF LAW, THE ALJ CORRECTLY FOUND THAT THE GENERAL COUNSEL ESTABLISHED THAT LAREDA HAYES'S DECISION NOT TO HIRE WISE WAS UNLAWFUL**

***i. DISCRIMINATION UNDER SECTIONS 8(a)(1) and 8(a)(3)***

The ALJ correctly determined that Respondent's failure to hire Wise was unlawful. The ALJ's credibility determinations led her to correctly conclude that (i) Respondent was hiring, (ii) Wise was qualified for the position to which he applied, and (iii) Respondent's employee, Hayes, knew of Wise's protected activities which contributed to Hayes's decision not to hire Wise.

The ALJ based its decision regarding Hayes's unlawful failure to hire Wise on solid credibility determinations. The ALJ did not find Hayes's articulated reason, that Wise's availability was less than others', to be credible. ALJD P13, L36-45. Specifically, the ALJ found it credible that "Wise as not more limited in his availability than some other employees who applied and were hired." *Id.* The ALJ properly found that "Hayes's scant record of disciplining Wise for the infractions she alleged were serious is evidence of discriminatory pretext." ALJD P14, L12-15. That Hayes's assertions that her basis for not hiring Wise was that

no other employees had the combination of infractions as Wise, is wholly lacking in evidentiary support. This is why the ALJ properly found Hayes's allegation lacking credibility. Moreover, the ALJ properly did not find Hayes's cited reasons for not hiring Wise credible because of Hayes's shifting and inconsistent stories. The record was replete with Hayes's shifting explanations and inconsistent stories.

Respondent refused to hire Wise, knowing intimately of his union involvement, because it harbored anti-union animus towards Wise and his Fight for \$15 and a Union protected concerted activities. Under Section 8(a)(3) of the Act, an employer may not discriminate with regard to hire in order to discourage union activity. The Board applies the analysis approved in *Wright Line*: the General Counsel must show that (1) the employee engaged in union activity, (2) the employer had knowledge of that activity, and (3) the employer harbored animus towards that activity. *Wright Line*, 251 NLRB 1083 (1980), enfd 662 F.2d 899 (1<sup>st</sup> Cir 1981), cert den 455 U.S. 989 (1982). Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Ronin Shipbuilding*, 330 NLRB 464, 464 (2000). Once this initial showing is made, the burden shifts to the Respondent to show that it would have taken the same action even in the absence of the employee's protected union activity. *Id.*

It is also well established that the Act's prohibition against "discrimination in regard to hire" protects applicants for employment. See *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 87 (1995); *Willmar Electric Service, Inc. v. NLRB*, 968 F.2d 1327, 1329 (D.C. Cir. 1992). Accordingly, an employer violates Section 8(a)(3) and (1) of the Act by refusing to hire an employee because of his union activity. See *NLRB v. Transportation Management Corp.*, 462

U.S. 393, 398 (1983); *Traction Wholesale*, 216 F.3d 92 (D.C. Cir. 2000), 99; *Gold Coast Restaurant Corp. v. NLRB*, 995 F.2d 257, 263-264 (D.C. Cir. 1993).<sup>8</sup>

As presented by the Board in *FES (a Division of Thermo Power)*, 331 NLRB No. 20 (2000), 2000 WL 627640, *enforced* 301 F.3d 83 (3d Cir. 2002), the three elements required for the General Counsel to establish a discriminatory refusal-to-hire are: (1) that the employer was hiring, or had concrete plans to hire, at the time of the alleged discrimination; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire (or, alternately, that the employer did not apply those requirements uniformly, or used them as a pretext for discrimination); and (3) that antiunion animus contributed to the decision not to hire the applicants.<sup>9</sup> If the General Counsel successfully establishes these elements, the burden then shifts to the employer to demonstrate that it would have taken the same action even absent its antiunion animus. *See FES*, 331 NLRB No. 20, slip op. at 4; *Cobb Mechanical Contractors, Inc. v. NLRB*, 295 F.3d 1370, 1375 (D.C. Cir. 2002).

The ALJ correctly determined that the General Counsel successfully met her burden of establishing these elements. The burden then correctly shifted to Respondent. The ALJ properly reached credibility determinations on which she correctly concluded that Respondent failed to meet its burden that it would have taken the same action even absent antiunion animus.

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<sup>8</sup> Section 7 of the Act (29 U.S.C. § 157) confers on employees “the right to self-organization, to form, join, or assist labor organizations . . . .” Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), in turn, makes it unlawful for an employer “to interfere with, restrain, or coerce employees in the exercise” of their Section 7 rights. Because antiunion discrimination necessarily “coerces employees in the exercise” of their rights under Section 7, “a violation of [Section] 8(a)(3) constitutes a derivative violation of [Section] 8(a)(1).” *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

<sup>9</sup> These elements as otherwise stated still stand firmly against Respondent and support the General Counsel’s argument: An employer’s refusal to hire a job applicant may violate Section 8(a)(3) and (1) of the Act if the refusal is based upon the employee’s union affiliation or protected activity. *Fluor Daniel, Inc.*, 311 NLRB 498, 500 (1993). The elements of a discriminatory refusal to hire are: (1) the employment application; (2) the refusal to hire; (3) a showing that the applicant was a union supporter or sympathizer; (4) evidence that the employer knew of the applicant’s union support; (5) maintained an animus against the union; and (6) refused to hire the applicant due to such animus. *Aneco, Inc.*, 325 NLRB 400 (1998); *Blaylock Electric*, 319 NLRB 928, 931 (1995); *Big E’s Foodland, Inc.*, 242 NLRB 963, 968 (1979).

***a. RESPONDENT WAS HIRING AT THE TIME OF DISCRIMINATION***

The ALJ properly concluded that the evidence presented at the hearing by both General Counsel and Respondent without question established that Respondent was hiring and accepting applications for hire and re-hire. On March 25 and 26, 2015, when Respondent EYM King of Missouri, d/b/a Burger King, was taking over operations of the Burger King restaurant located at 1102 East 47<sup>th</sup> Street, Kansas City, Missouri, where Wise was employed, Respondent's store manager, LaReda Hayes, distributed applications to Strategic Restaurant's former employees for consideration by Respondent for rehire. Tr. 61-66; Tr. 62-63; Tr. 152: 11-12 (Humbert); GC Ex. 39; Tr. 190-91 (Ortiz); GC Ex. 40; Tr. 222: 10-19 (Jones); Tr. 328: 22-25 (Hayes). Hayes admits that Respondent was hiring. Tr. 328-329 (Hayes). Hayes claims it was her sole discretion to decide whether or not to hire applicants. Tr. 329 (Hayes). When Wise worked at Strategic Restaurants until the time Respondent took over operations, Wise's store manager was Hayes, who transitioned to become the store manager at the same location under Respondent's ownership. Tr. 41-42, 61 (Wise); Tr. 327-328 (Hayes). On March 25, 2015, Hayes gave Wise an application—composed of a single form—to be considered for rehire under Respondent's ownership, while she gave to other employees a more elaborate folder that contained an application, I-9 forms, and W-2 forms. Tr. 62-63; Tr. 152: 11-12 (Humbert); GC Ex. 39; Tr. 190-91 (Ortiz); GC Ex. 40; Tr. 222: 10-19 (Jones); Tr. 328: 22-25 (Hayes).

That Respondent was hiring and accepting applications at the time it refused to hire Wise is not in question based on the record. Accordingly, the ALJ properly concluded that Respondent was hiring and accepting applications.

***b. WISE HAD EXPERIENCE AND TRAINING FOR THE POSITION, ALTERNATIVELY HAYES'S HIRING CRITERIA WERE USED AS PRETEXT FOR DISCRIMINATION AGAINST WISE***

Wise's many years of experience, well-known, high quality job performance and service record made him arguably better trained and qualified for the job to which he applied than any other applicant. Terrance Wise was employed at the Burger King located at 1102 East 47<sup>th</sup> Street, Kansas City, Missouri for approximately six years. Tr. 29-30 (Wise). He had worked for Burger King restaurants for eleven years. Tr. 29 (Wise). Despite being terminated by Hayes (Tr. 67-68), Wise had been honored by store manager Hayes for the quality of his work performance. Tr. 60, 68. In December, 2014, Hayes presented Wise with a certificate of excellence in work for the year 2014 and openly praised Wise for his hard work and for being a very good employee, in front of all of Wise's co-workers. Tr. 60 (Wise). Hayes had also called Wise one of her best workers. Tr. 68. Likewise, Wise's co-workers have called him "an excellent worker," "on time," "dependable," and "good at what he did." Tr. 176. Based on the record presented at hearing, Hayes did not hire any other worker who had more experience than Wise, and Wise was only worker that Respondent did not re-hire.

Hayes's claims that she did not hire Wise because of his past insubordination or misconduct lack credibility and are pretextual, fabricated reasons to disguise Hayes's clear, long-held anti-union animus. A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not, in fact, relied upon, thereby leaving intact the inference of wrongful motive. *International Carolina Glass*, 319 NLRB 171, 174 (1995). Despite Wise's service record and even Hayes's praise for his work, honoring him at a Christmas party (Tr. 60), at the time of the present litigation Hayes complains that Wise had become tardy and "insubordinate" by, for example, giving food to the homeless, after it had been "counted," that would otherwise have been thrown in the dumpster. Tr. 342: 17-23 (Hayes); Tr. 423-424 (Wise). Yet, when asked about Wise's insubordination, Hayes could not cite a single specific instance of

insubordination or any specific details about such instances, but merely that they had occurred. *See* Tr. 334-385 (Hayes). Hayes shrouds her motivation for terminating Wise in unspecific accounts of Wise's changed "attitude" (Tr. 342 (Hayes)) or in her subjective, unsubstantiated feeling that Wise was "thinking he was just running the place pretty much." Tr. 342:13-16. (Hayes). Wise vehemently denied this insubordination and further clarified that his alleged tardiness was due to being eight minutes late, even though he had stayed 20 minutes after work the night before, because the bus schedule being behind such that he could not have known three hours in advance that he was going to be late. Tr. 417-421 (Wise). Moreover, and perhaps more importantly, Hayes admits that some of the discipline against Wise of which she spoke had been removed from his record as part of the resolution of unfair labor practice charges Wise had filed. Tr. 368 (Hayes). The ALJ correctly decided that Hayes's articulated reasons for refusing to hire Wise lacked credibility because of Hayes's shifting explanations and changing stories.

Allegations that Wise had "stolen" burgers from the restaurant in the past were thoroughly debunked at hearing. Yon Nonnua Cline, or "Nia," one of Hayes's shift managers, claims that when she started her shift she stopped Wise as he was leaving the restaurant, searched his person, and found "maybe about four or five burgers" in his pockets. Tr. 319 (Cine). Hayes admits to having no first-hand knowledge of this incident. Tr. 373: 17-19 (Hayes). Wise provided an in-depth retelling of the alleged incident, clearing him in the mind of any reasonable person of any wrongdoing. Specifically, Wise testified to the fact that he had permission from the manager actually on duty during his shift, Sharrell, to take the burgers with him when he left that day. Tr. 426 (Wise). Cline, who purports to have caught Wise taking the burgers, was not Wise's shift manager that day and found him with the burgers after he had been given permission from a different manager as Cline was walking in to start her shift. Tr. 426-

427 (Wise). Moreover, Ortiz testified to the regular and customary practice of managers allowing workers to take food in the manner in which Wise was alleged to have taken it. Tr. 436-437 (Ortiz); Tr. 428 (Wise).

Hayes impeached her own credibility as a witness when she contradicted her own testimony about whom she chose not to hire other than Wise when it was revealed that the many other workers Hayes chose not to hire failed to ever even apply for the jobs in question. Tr. 329-331 (Hayes), Tr. 376: 21-25, 377-378 (Hayes). Factors relevant to a finding of unlawful motivation include the employer's expressed hostility toward protected activity, knowledge of the employees' protected activity, the timing and abruptness of the adverse action in relation to employees' protected activity, and inconsistencies between the proffered reason for the discharge and other actions of the employer. *W.F. Bolin Co.*, 70 F.3d at 871; *NLRB v. A & T Mfg. Co.*, 738 F.2d 148, 150 (6<sup>th</sup> Cir. 1984); *Overseas Motor, Inc.*, 721 F.2d at 571.

Even if one believes Respondent's unsubstantiated claims about Wise's performance record, nothing in the record demonstrates that this motivated Hayes's action other than her own, self-contradicting, weak testimony. See *General Thermo, Inc.*, 250 NLRB 1260, 1261 (1980) enf. denied 664 F.2d 195 (8th Cir. 1981) (explaining "[t]he existence of a justifiable ground... is no defense if it is a pretext used to mask an unlawful motive"). The lack of any corroborating documents or testimony raises a strong inference that Respondent's entire defense, if any, regarding Hayes's testimony, is fabricated. As one Administrative Law Judge explained:

[A]n adverse inference may be drawn regarding the employer's "real" motive where the employer relies on "weak" evidence (e.g., the testimony of an agent that specific "business" reasons accounted for the allegedly unlawful action) where the employer is in possession of stronger evidence (e.g., relevant business records, or the testimony of other knowledgeable management agents) which would either corroborate or contradict the testimonial claim, but which the employer nevertheless fails to introduce. *Miramar Hotel Corp.*, 336 NLRB 1203, 1215 (2001) (citations omitted).

The only evidence Respondent provided about Wise's alleged poor performance was weak, inaccurate, and thoroughly contradicted by Hayes's own contrary testimony. If Wise's alleged theft of burgers was such an important part of Hayes's reason for not hiring Wise, then Respondent should have put on evidence from Sharrell, who gave Wise permission to have the burgers that Cline and Hayes allege Wise "stole." Respondent provide no such testimony. Moreover, Hayes and Cline testified that one of the reasons Wise was conveniently not ever disciplined was because of a purported directive from HR about which no written email or any documentation confirming its existence was presented. Hayes and her shift manager, Cline, alleged that they were not allowed to write up any employee on "the strike committee" if their name is on a list given to them by their Human Resources. Tr. 322 (Cline); Tr. 340 (Hayes). Yet, this elusive list was never produced in the record, nor was any evidence of such a directive other than the testimony of these two witnesses produced. In effect, Hayes has said that Wise was a poor employee, yet has absolutely no documentation or specific facts in testimony to support such claims.

As suspect as the claims of Hayes and Cline are regarding Wise's work record, more alarming is the outright falsehood Hayes presented during this hearing to shield Hayes's true hiring practices when Respondent took over this store. Tr. 329-331 (Hayes), Tr. 376: 21-25, 377-378 (Hayes). Specifically, Respondent's counsel asked Hayes why she did not hire Drucilla McCoy, Kadesha Jackson, and Joshua Comeaux to work for Respondent, and Hayes claimed she did not hire them to work for Respondent because of their poor performance when they were employed by Respondent's predecessor, Strategic Restaurants. Tr. 329-331 (Hayes). Yet, Hayes admits later that Drucilla McCoy, Kadesha Jackson, and Joshua Comeaux did not even apply or fill out applications to be hired by Respondent, despite her claims that she did not rehire them for

Respondent because of their past performance. Tr. 376: 21-25, 377-378 (Hayes). Indeed, the employer's reliance on a false motive supports the finding that the real motive was an unlawful one. *See Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Respondent sought to put on this evidence to show that Wise was not the *only* former employee of Strategic Restaurants that was not rehired, yet clearly Wise was the *only* former Strategic employee that Respondent did not hire. Any of Hayes's claims to the contrary cannot be believed because she falsely alleged that she did not hire other former employees because of their poor past performance, when in fact, these employees never even applied or filled out an application.

Hayes's alleged reasons for not hiring Wise were clearly and thoroughly contradicted by the credible testimony of other witnesses and by her own impeached credibility. Due to the egregious nature of Hayes's self-contradicting, false testimony, only one reasonable inference may be drawn from Hayes's testimony: that her purported reasons for failing to hire Wise, thoroughly debunked by this record, and applied unevenly and falsely against Wise, were merely used as pretext for failing to hire Wise due to his well-known engagement in protected concerted activities. Accordingly, the ALJ properly concluded that Hayes's articulated reasons for failing to hire Wise lacked credibility.

***c. HAYES KNEW OF WISE'S UNION SUPPORT AND HAYES'S ANTI-UNION ANIMUS CONTRIBUTED TO THE DECISION NOT TO HIRE WISE***

That Hayes knew of Wise's union support is not in question. Hayes was acutely aware of Wise's involvement with WOC-KC and admits that she knew Wise was a union supporter and had been "extensively quoted in the media, in newspapers and on television about the movement." Tr. 371: 1-18 (Hayes); Tr. 41-43; Tr. 75. Prior to WOC-KC's first strike in 2013, Hayes pilfered through Wise's personal backpack and belongings and found flyers announcing a WOC-KC rally for \$15 and a Union, to which Wise invited Hayes. Tr. 43. Hayes often came to

Wise to help her remedy problems she had with workers she knew to be involved with Wise in the Fight for \$15 and a Union. Tr. 44-45; Tr. 372-373 (Hayes). Wise had filed multiple unfair labor practices against at the National Labor Relations Board Subregion 17 involving Hayes and her then-employer, Strategic Restaurants, including a charge for being intimidated and disciplined for going on strike and engaging in protected concerted union activity. Tr. 47-50, 50-60; GC's Ex. 9-18. In mid-March, 2015, Wise and other members of WOC-KC engaged Hayes in a "Health and Safety Campaign" by submitting to Hayes a signed petition demanding that sufficient oven mitts, that broken equipment be fixed, and that she stock the first aid kit with Band-Aids and burn cream. Tr. 46 (Wise); Tr. 199-201 (Ortiz).

On March 26, 2015, Respondent did not hire Wise, although it rehired almost every other former employee of Strategic Restaurants, including those that had far less experience and worse performance records. Tr. 61-66; *see* Tr. 162, 190. Based on the record presented at hearing, Wise was the only employee working for Strategic Restaurants at the time of the transition that was not rehired. *See* Tr. 329-331; 376: 21-25, 377-378 (Hayes). Respondent's counsel asked Hayes why she did not hire Drucilla McCoy, Kadesha Jackson, and Joshua Comeaux to work for Respondent, and Hayes claimed she did not hire them to work for Respondent because of their poor performance when they were employed by Respondent's predecessor, Strategic Restaurants. Tr. 329-331 (Hayes). Yet, Hayes admits later that Drucilla McCoy, Kadesha Jackson, and Joshua Comeaux did not even apply or fill out applications to be hired by Respondent, despite her claims that she did not rehire them for Respondent because of their past performance. Tr. 376: 21-25, 377-378 (Hayes). Hayes's outright lie regarding her hiring practices for Strategic dramatically impairs and impeaches the credibility of her testimony. Moreover, the most egregious claim laid against Wise, that he stole food from the restaurant, was

definitively debunked because Wise had permission to have taken that food and Respondent provided no evidence to the contrary. Tr. 426 (Wise).

Moreover, Hayes's hiring practices for Respondent were, on their face, discriminatory against Wise, when, on March 25, 2015, she gave Wise an application—composed of a single form—to be considered for rehire under Respondent's ownership, while she gave to other employees a more elaborate folder that contained an application, I-9 forms, and W-2 forms. Tr. 62-63; Tr. 152: 11-12 (Humbert); GC Ex. 39; Tr. 190-91 (Ortiz); GC Ex. 40; Tr. 222: 10-19 (Jones); Tr. 328: 22-25 (Hayes). Yet, Hayes claims that she gave Wise the same application she provided to other potential employees. Tr. 345: 14-21 (Hayes).

Thus, Respondent has offered distinct, conflicting, and false explanations for why Wise was not hired. Such shifting explanations require the inference that Respondent's explanations are all pretextual, and Respondent's true motives were unlawful. *Shattuck Denn Mining v. NLRB*, 362 F.2d 466 (9th Cir. 1966). Indeed, the employer's reliance on a false motive supports the finding that the real motive was an unlawful one. *See Id.* at 470.

The Board is under no obligation to accept at face value an employer's asserted explanation for adverse action "if there is a reasonable basis for believing that it 'furnished the excuse rather than the reason for [its] retaliatory action.'" *Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981), *Accord NLRB v. Horizon Air Services*, 761 F.2d 22, 28 (1st Cir. 1985). Indeed, "the policy and protection of the [Act] does not allow the employer to substitute 'good' reasons for 'real' reasons when the purpose of the discharge is to retaliate for an employee's concerted activities." *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1352 (3d Cir. 1969).

Hayes also claims that she did not discipline Wise as much as he deserved because of an alleged directive from Strategic's Human Resources Department requiring Hayes not to discipline Wise because of his protected concerted activities. Tr. 322 (Cline); Tr. 340 (Hayes). It was clear based on Hayes's testimony that the alleged selective enforcement of discipline against Wise was nothing more than "the result of the [Respondent's] reaction to an employee [Wise] suspected of being a union supporter." *See Adair Standish Corp. v. NLRB*, 912 F.2d 854, 862 (6th Cir. 1990) ("That the [employer] chose to impose penalties upon [union activists] soon after the election for behavior that previously had been condoned through inaction strongly suggests improper motivation."). *See also NLRB v. Gold Standard Enterprises, Inc.*, 679 F.2d 673, 679 (7th Cir. 1982).

As the Board has noted, "[I]lawful causes for discharge may exist, yet are no defense where . . . the evidence shows that the employer resorted to those reasons as a way of building a case against an employee because of his union activities." *The Bond Press, Inc.*, 254 NLRB 1227, 1233 (1981). Accordingly, Hayes's comments regarding Wise's alleged unsatisfactory work performance and theft being the *sole* causes of her decision not to re-hire him, as Respondent argues, defies reason and the evidence presented. *See The Bond Press, Inc.*, 254 NLRB at 1233 (employer's "sudden intolerance of [employees'] tardiness and absenteeism" supported finding of unlawful motive).

Hayes was involved in multiple past unfair labor practice charges regarding Wise's protected concerted activity. Tr. 47-50, 50-60; GC's Ex. 9-18. Indeed, the Court has held that independent violations of the Act supply strong evidence of an employer's unlawful motive. *See NLRB v. American Bed Spring Mfg. Co.*, 670 F.2d 1236, 1245 (1st Cir. 1982). Hayes's involvement in these alleged adverse actions, now linked to Wise's subsequent non-hire, amount

to an inference of compelling evidence of Respondent's unlawful motive. *See Boston Mut. Life Ins. Co. v. NLRB*, 629 F.2d 169, 171 (1st Cir. 1982) (observing that threat to retaliate against employee supports finding that employer later unlawfully discharged him).

Once the General Counsel has established this prima facie case, the burden shifts to the employer to show that it would not have hired the applicants even in the absence of their union affiliation. *TIC—The Industrial Co. Southeast*, 322 NLRB 605, 609–610 (1996). If the reasons offered do not exist or were not in fact relied upon, then the employer has not met its burden. *Id.*, at 610. *See also, Fluor Daniel, Inc.*, supra, 311 NLRB at 498. As has been established by Hayes's many inconsistencies and false testimony, the reasons Hayes proffered for Wise's termination do not exist and were not in fact relied upon in Respondent's decision not to hire Wise.

Respondent alleges that it did not discriminate against Wise because it hired other union supporters. Tr. 332-338 (Hayes). It is settled that "a discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents." *FedEx Freight East, Inc. v. NLRB*, 431 F.3d 1019, 1030 (7th Cir. 2005). As shown above, Respondent failed to meet that burden. In this regard, the Board has stated that where the employer has a practice that permits discretionary enforcement of a rule, the employer must demonstrate uniform application of that discretion if it is to satisfy its *Wright Line* burden. *See Avondale Indus.*, 329 NLRB 1064, 1067 (1999)(where "the evidence shows that [the employer] may, or may not, have [taken the challenged disciplinary action], i.e., the record of disciplinary action is mixed[,], [t]he General Counsel's case has not been rebutted[.]"); *Associated Milk Producers, Inc.*, 259 NLRB 1033, 1035 (1982) (where the driver's manual provided only that a driver "could be subject to immediate discharge" for the infraction, the Board held that "[s]ince

the rule on its face is discretionary, the burden was upon [the employer] to demonstrate that termination was the discipline uniformly imposed for violation of the rule[ ]"), *enforced*, 711 F.2d 627 (5th Cir. 1983). While Hayes asserts that Wise was not rehired because of past allegations of theft for taking food, other employees who also took food in the same manner as Wise were not disciplined and were rehired. Tr. 436-437 (Ortiz); Tr. 428 (Wise). Moreover, the rules were not applied consistently against Wise, as Hayes asserts, *because* of his union activities. Tr. 322 (Cline); Tr. 340 (Hayes).

The murky, conflicting record set forth by Respondent for its actions against Wise fail to explain what, if any, procedures and policies it followed in deciding on the appropriateness of more severe actions such as suspension and discharge and the failure to hire Wise. *Compare Avondale Indus.*, 329 NLRB 1064, 1066 (1999) (noting that the employer failed to carry its *Wright Line* burden when it "did not attempt to show that the disparit[ies] in discipline . . . [could be attributable to, for example,] differences in work history, to the severity of misconduct, or to some other factor unrelated to the union activity[ ]"). *Accord Walker Stainless, Inc.*, 334 NLRB 1260, 1262 (2001). While Hayes alleged that Wise's work record was poor, Respondent failed to provide any evidence that the disparities in rehiring other employees were attributable to the severity of the alleged misconduct or other factors unrelated to the union activity. Surely, Respondent could *not* show why such a disparity exists because Wise was the *only* former Strategic employee not rehired by Respondent. The fabricated record of Wise's alleged theft and the unsubstantiated claims about Wise's past work history, combined with Hayes's admittedly inconsistent testimony, show that Respondent has completely failed to carry its burden to show that disparities in hiring were attributable to differences in work history.

The record is clear: General Counsel met its burden of persuasion. The ALJ properly determined that Hayes's articulated reasons for failing to hire Wise lacked credibility. It is uncontested that Respondent was hiring and that Hayes was acutely aware of Wise's union activity. Wise was extremely well-qualified for the position to which he applied. Alternatively, Hayes's fabricated hiring criteria were used a pretext for failing to hire Wise because of his union activity. Hayes's anti-union animus clearly contributed to her decision not to hire Wise. Wise was the only former Strategic employee not hired by Respondent. Hayes presented false testimony to the contrary and her credibility and testimony accordingly should be disregarded entirely. Each and every alleged non-discriminatory reason that Hayes did not hire Wise was credibly and completely rebutted or was based on inconsistent testimony. Therefore, General Counsel met her burden and Respondent has failed to show even one legitimate, non-discriminatory reason for its failure to hire Wise, a well-known union leader and activist and an employee exceedingly well-qualified for the position to which he applied.

## **V. CONCLUSION**

Accordingly, the notice posting remedy ordered by the ALJ is not improper. Based on the entire record in this matter and on the foregoing argument, the decision of the ALJ should be upheld, all of Respondent's exceptions should be denied, and the *Complaint* should not be dismissed.

Dated at Kansas City, Missouri this 22<sup>nd</sup> day of March, 2015.

## **STATEMENT OF SERVICE**

I hereby certify that a copy of the foregoing Charging Party's Reply Brief Answering Respondent's Exceptions has been e-filed with the Office of Executive Secretary/Board and that a copy has been served by certified and regular mail and email to the following:

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Dated March 22, 2016

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